TEXAS REGISTER

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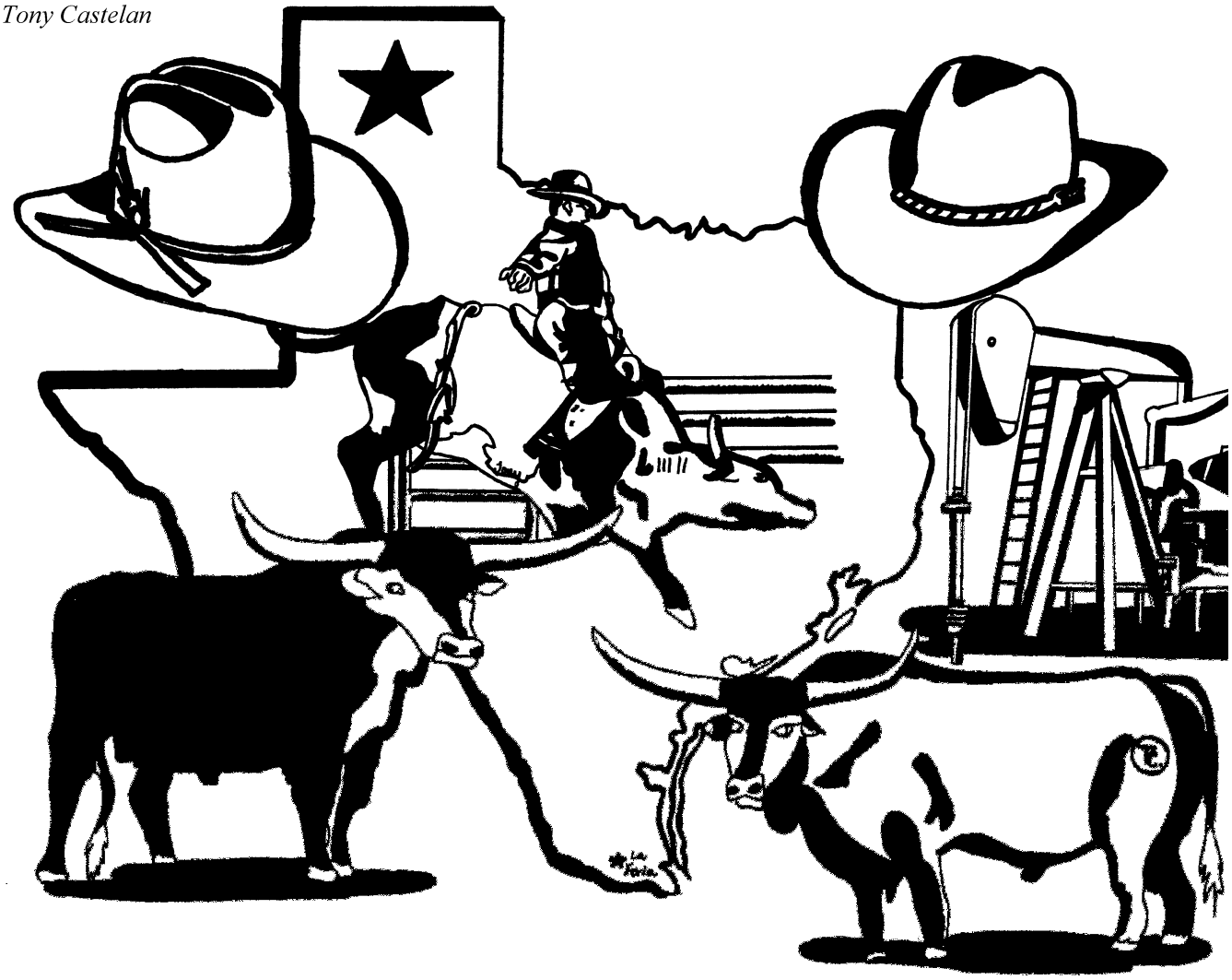
Tony Castelan



School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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(800) 226-7199
(512) 463-5561
FAX (512) 463-5569
http://www.sos.state.tx.us
register@sos.state.tx.us

IN THIS ISSUE

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TRANSFERRED RULES

RULE REVIEW

TABLES AND GRAPHICS

IN ADDITION

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 463-5561 in Austin. For out-of-town callers our toll-free number is 800-226-7199. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0588-GA

(Closed due to litigation)

RQ-0630-GA

Requestor:

The Honorable Jeff Wentworth

Chair, Committee on Jurisprudence

Texas State Senate

Post Office Box 12068

Austin, Texas 78711

Re: Whether section 531.0972, which establishes a pilot program in Bexar County that may involve the anonymous exchange of used hypodermic needles and syringes, exempts participants in the program from criminal prosecution for possession of drug paraphernalia (RQ-0630-GA)

Briefs requested by November 5, 2007

RQ-0631-GA

Requestor:

The Honorable Charles A. Rosenthal, Jr.

Harris County District Attorney

1201 Franklin Street, Suite 600

Houston, Texas 77002

Re: Authority of the Harris County Commissioners Court to lease or purchase a juvenile detention center in Colorado County, and to use asset forfeiture funds in the transaction (RQ-0631-GA)

Briefs requested by November 5, 2007

For further information, please access the Web site at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200704836
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: October 10, 2007

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Opinions

Opinion No. GA-0574

The Honorable Charlie F. Howard

Chair, Committee on Local and Consent Calendars

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: School district responsibilities under section 25.0951(a) of the Texas Education Code (RQ-0584-GA)

S U M M A R Y

Under section 25.0951(a) of the Education Code, a school district must file a complaint or referral against a student who has accumulated ten or more unexcused absences within a six-month period in the same school year within ten school days of the student's tenth absence. Failure to file within the requisite time will lead to dismissal of the complaint or referral, but the school district may file a new complaint, listing some of the same absences as well as a subsequent tenth unexcused absence, within ten school days of the tenth absence listed in the complaint or referral. To the extent Attorney General Opinion GA-0417 construes section 25.0951(a) to require filing a complaint or referral within seven school days, it has been superseded by amendments to the statute.

Other than requiring a court to dismiss the complaint or referral, the Education Code imposes no penalties on a school district that fails to file a complaint or referral within ten school days of the student's tenth unexcused absence.

Opinion No. GA-0575

The Honorable John R. Roach

Collin County Criminal District Attorney

Collin County Courthouse

210 South McDonald, Suite 324

McKinney, Texas 75069

Re: Whether a bail bond board may implement a rule allowing a temporary extension of the license expiration dates set forth in section 1704.162 of the Occupations Code (RQ-0585-GA)

S U M M A R Y

Under chapter 1704 of the Occupations Code, a bail bond board does not have the authority to promulgate or implement a rule allowing the

board to issue a temporary bail bond surety license or permit, or to extend a prior license's expiration date.

Opinion No. GA-0576

The Honorable Mike Jackson

Chair, Committee on Nominations

Texas State Senate

Post Office Box 12068

Austin, Texas 78711-2068

Re: Whether under article III, section 52(b) and (c) of the Texas Constitution a county may use road bond funds to construct, maintain, or operate a municipal street that connects on only one end with a county road or state highway (RQ-0598-GA)

S U M M A R Y

If a county determines that a particular municipal street is a connecting link or an integral part of a county road or state highway, the county may use the proceeds of road bonds issued under article III, section 52(b) and (c) of the Texas Constitution to construct, maintain, or operate the municipal street.

For further information, please access the Web site at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200704843

Stacey Napier

Deputy Attorney General

Office of the Attorney General

Filed: October 10, 2007

PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 4. OFFICE OF THE SECRETARY OF STATE

CHAPTER 81. ELECTIONS

SUBCHAPTER C. VOTING SYSTEMS

1 TAC §§81.40, 81.41, 81.48, 81.53

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the Office of the Secretary of State, Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Office of the Secretary of State, Elections Division, proposes the repeal of 1 TAC §§81.40, 81.41, 81.48, and 81.53, concerning voting systems. The rules were rendered obsolete by §122.001(d) of the Texas Election Code.

The repeal of §81.40, concerning voting system sample ballots, is necessary to delete references to punch card and mechanical voting systems. Use of a punch card or mechanical voting system in an election is now prohibited.

The repeal of §81.41, concerning voting system specimen ballots, is necessary because use of a punch card ballot or similar form of tabulating card or a mechanical voting system in an election is now prohibited.

The repeal of §81.48, concerning preservation of the write-in record on mechanical voting systems, is necessary because use of a mechanical voting system in an election is now prohibited.

The repeal of §81.53, concerning preservation of punch card ballot label assembly, is necessary because the use of a punch card ballot or similar form of tabulating card in an election is prohibited.

Ann McGeehan, Director of Elections, has determined that for the first five-year period the repeal is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Ms. McGeehan has determined also that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be to eliminate outdated rules. There will be no effect on small businesses.

Comments on the repeal may be submitted no later than November 19, 2007, to Ann McGeehan, Director of Elections, Office of the Secretary of State, P.O. Box 12060, Austin, Texas 78711-2060.

The repeal is proposed under §31.003 and §128.001(c) of the Texas Election Code, which provide the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Texas Election Code and other election laws. No other codes are affected by the repeal.

§81.40. Voting System Sample Ballots.

§81.41. Voting System Specimen Ballots.

§81.48. Write-in Record To Be Sealed.

§81.53. Preservation of Punch-Card Ballot Label Assembly.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 2, 2007.

TRD-200704646
Ann McGeehan
Director of Elections
Office of the Secretary of State
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 463-5650

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SUBCHAPTER E. ELECTION DAY PROCEDURES

1 TAC §81.84, §81.85

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the Office of the Secretary of State, Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Office of the Secretary of State, Elections Division, proposes the repeal of 1 TAC §81.84 and §81.85, concerning election day procedures. The rules were rendered obsolete by §122.001(d) of the Texas Election Code. The challenge procedures have been superseded by provisional voting, making the rules unnecessary.

Ann McGeehan, Director of Elections, has determined that for the first five-year period the repeal is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the repeal.

Ms. McGeehan has determined also that for each year of the first five years the repeal is in effect, the public benefit anticipated as a result of enforcing the repeal will be to eliminate outdated rules. There will be no effect on small businesses.

Comments on the repeal may be submitted no later than November 19, 2007, to Ann McGeehan, Director of Elections, Office of

the Secretary of State, P.O. Box 12060, Austin, Texas 78711-2060.

The repeal is proposed under §31.003 and §128.001(c) of the Texas Election Code, which provides the Office of the Secretary of State with the authority to obtain and maintain uniformity in the application, interpretation, and operation of provisions under the Texas Election Code and other election laws. No other codes are affected by the repeal.

§81.84. Ballot Stub Procedure for Challenged Voters.

§81.85. Ballot Stub Procedure for Voting (Lever) Machines and Direct Recording Devices.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 2, 2007.

TRD-200704645
Ann McGeehan
Director of Elections
Office of the Secretary of State
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 463-5650

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER I. TRANSMISSION AND DISTRIBUTION

DIVISION 2. TRANSMISSION AND DISTRIBUTION APPLICABLE TO ALL ELECTRIC UTILITIES

16 TAC §25.214

(Editor's note: In accordance with Government Code, §2002.014, which permits the omission of material which is "cumbersome, expensive, or otherwise inexpedient," the figure in 16 TAC §25.214 is not included in the print version of the Texas Register. The figure is available in the on-line version of the October 19, 2007, issue of the Texas Register.)

The Public Utility Commission of Texas (commission) proposes an amendment to §25.214, relating to Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities. The proposed amendment will establish a definition for a retail seasonal agricultural customer in Chapter One of the Pro-Forma Retail Delivery Tariff for Transmission Distribution Service Providers (TDSPs) to ensure that the seasonal agricultural customer exemption, currently within each TDSP's tariff, is consistently applied to customers by each TDSP. Project Number 34561 is assigned to this proceeding.

The tariff of each TDSP contains a requirement that the determination of Billing Demand applicable to the Distribution System Charge shall be the higher of the customer's demand for the current billing month, or 80% of the customer's highest monthly demand established in the 11 months preceding the current billing month (80% ratchet). This provision applies to non-residential customers receiving: (1) service at secondary voltage with demand greater than 10 kilovolt ampere (kVa), 10 kilowatt (kW), or 5kW; (2) primary service; and/or (3) service at transmission level. All of the current TDSP tariffs provide that a "Retail Seasonal Agricultural Customer" is exempt from the 80% ratchet. While two TDSPs have company-specific definitions for a Retail Seasonal Agricultural Customer in their tariffs, no standard definition of a Retail Seasonal Agricultural Customer exists that would ensure that the exemption is uniformly applied to customers within all TDSP territories. This proposed rulemaking seeks to establish a standard definition in the Pro-Forma Retail Delivery Tariff to be reflected in each TDSP's tariff to ensure uniform application of the exemption. TDSPs will be required to file a compliance tariff incorporating the new language within 30 days of the effective date of the revised rule and Pro-Forma Retail Delivery Tariff.

Lauren Damen, Senior Retail Market Analyst, has determined that, for each year of the first five-year period the proposed amendment is in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the amended section.

Ms. Damen has determined that, for each year of the first five years the amended section as proposed is in effect, the public benefit anticipated as a result of enforcing the amended section will be consistent treatment of seasonal agricultural customers across all TDSPs. There will be no adverse economic effect on small businesses or micro-businesses as a result of enforcing this amended section. There is no anticipated economic cost to persons who are required to comply with the section as proposed.

Ms. Damen has also determined that, for each year of the first five years the amended section as proposed is in effect, there should be no effect on a local economy; therefore, no local employment impact statement is required under the Administrative Procedure Act (APA), Texas Government Code, §2001.022.

The commission staff will conduct a public hearing on this rulemaking, if requested pursuant to the Administrative Procedure Act, Texas Government Code, §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on Wednesday, November 28, 2007, at 9:00 a.m. CPT in the Commissioners' Hearing Room. The request for a public hearing must be received within 21 days after publication.

Comments on the proposed amendment may be submitted to the Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711- 3326, within 21 days after publication. Sixteen copies of comments on the proposed amendment are required to be filed pursuant to §22.71(c) of this title. Reply comments may be submitted within 30 days after publication. Comments should be organized in a manner consistent with the organization of the proposed rule(s). The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the amended section as proposed. The commission will consider the costs and benefits in deciding whether to adopt the amended section. All comments should refer to Project Number 34561. In addition to the proposed language, the commission requests that parties submit comments on the following questions.

Please explain your answers, provide any requested language, and provide applicable examples.

(1) The proposed definition of "retail seasonal agricultural customer" includes the requirement that the customer's energy consumption be "subject to significant seasonal variation." Should the definition specify what constitutes significant seasonal variation?

(2) Should the definition include a specific time limit on the number of months that an agricultural customer can reach peak usage in order to be considered seasonal? Should the definition specify whether peak usage may be reached in more than one season, such as one summer peak and one winter peak? Should the definition specify a threshold amount that the peak(s) must be above the customer's average usage?

(3) The proposed definition currently includes irrigation that meets the requirements of the definition as an example of a possible retail seasonal agricultural customer. Is this an appropriate inclusion?

(4) Are there any customers that the proposed definition would include that should not be included? Are there any customers that the proposed definition would exclude that should be included?

This amendment is proposed under the Public Utility Regulatory Act, Texas Utilities Code Annotated, §14.002 (Vernon 2007) (PURA), which provides the Public Utility Commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction. The commission also proposes this rule pursuant to PURA, §36.001, which grants the commission the authority to adopt rules for determining the classification of customers and the applicability of rates; PURA, §39.203, which grants the commission the authority to establish reasonable and comparable terms and conditions for open access on distribution facilities for all retail electric utilities offering customer choice; and PURA §32.101, which requires an electric utility to file a tariff with the commission.

Cross Reference to Statutes: Public Utility Regulatory Act, §§14.002, 36.001, 39.203, and 32.101.

§25.214. Terms and Conditions of Retail Delivery Service Provided by Investor Owned Transmission and Distribution Utilities.

(a) - (c) (No change.)

(d) Pro-forma Retail Delivery Tariff.

(1) Tariff for Retail Delivery Service.

Figure: 16 TAC §25.214(d)(1)

(2) Compliance tariff. Compliance tariffs pursuant to this section must be filed by February 15, 2008 [~~June 15, 2006~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 2, 2007.

TRD-200704653
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 936-7223

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 95. COMMISSIONER'S RULES CONCERNING EDUCATION RESEARCH CENTERS

19 TAC §95.1001

The Texas Education Agency (TEA) proposes new §95.1001, concerning education research centers. The proposed new section would implement the requirements of the Texas Education Code (TEC), §1.005, Education Research Centers; Sharing Student Information, added by House Bill (HB) 1, 79th Texas Legislature, Third Called Session, 2006, that requires the commissioner of education and the Texas Higher Education Coordinating Board (THECB) to adopt rules for the use of student data at an education research center.

HB 1, Section 2.01, 79th Texas Legislature, Third Called Session, 2006, added the TEC, §1.005, providing for the creation of education research centers and for the sharing of student information. This legislation directs the commissioner of education and the THECB to adopt rules that provide for implementation of the new requirements. The TEC, §1.005, also requires the adoption of rules to protect the confidentiality of student information, including the establishment of procedures to ensure that confidential student information is not duplicated or removed from a center in an unauthorized manner.

Proposed new 19 TAC Chapter 95, Commissioner's Rules Concerning Education Research Centers, §95.1001, Operation of Education Research Centers, would correspond with the rule adopted by the THECB, with only formatting and reference changes for consistency with TEA rule format and style requirements. The proposed new 19 TAC §95.1001 would implement the legislative requirements, as follows.

Subsection (a) would define words and terms used in the proposed new section.

Subsection (b) would describe how an education research center may be established, who is eligible to serve as an education research center, and the responsibilities of an education research center.

Subsection (c) would explain the composition of the education research center Joint Advisory Board, terms of its members, and minimum number of meetings annually.

Subsection (d) would provide required authorizations for an education research center; required education research center leadership; and approvals needed from the THECB, TEA, and education research center Joint Advisory Board for access to confidential student data.

Subsection (e) would outline the conditions and notices leading to sanctions or termination of an education research center by the Joint Advisory Board, THECB, and TEA.

Subsection (f) would describe the security measures necessary for an education research center to maintain to avoid the unauthorized disclosure of confidential information.

Criss Cloudt, associate commissioner for assessment, accountability, and data quality, has determined that, for the first five-year period the proposed new section is in effect, there will be fiscal

implications for state government as a result of enforcing or administering the new section. There will be no fiscal implications for local government. The proposed rule action would have fiscal implications for the TEA. The total estimated cost to the TEA would be $70,976 in Fiscal Year 2008 and $65,976 for each year in Fiscal Years 2009-2012. This total estimated cost includes $62,976 for personnel costs for each year in Fiscal Years 2008-2012; $8,000 for other operating expenses in Fiscal Year 2008; and $3,000 for other operating expenses for each year in Fiscal Years 2009-2012. The estimated personnel costs reflect the addition of one systems analyst position to prepare data for the education research centers.

The legislation authorizes the THECB and the TEA to impose reasonable fees, as appropriate, for the use of research, resources, or facilities. The proposed rule action jointly establishes with the THECB that the THECB is responsible for general oversight, technical assistance, and state support of education research centers. The proposal also specifies that sponsoring IHEs are responsible for all equipment, salaries, and other operating costs of education research centers. Limitations to costs are provided in the proposal.

The proposed new section would incorporate procedural and reporting requirements contained in the TEC, §1.005, that education research centers must follow. The proposed new section may require local education agencies to provide additional information needed for specific research studies under the direction of an education research center.

Dr. Cloudt has determined that, for each year of the first five years the proposed new section is in effect, the public benefit anticipated as a result of enforcing the new section will be procedures for implementing education research centers that would conduct research for the benefit of education in the state, including research relating to the impact of state and federal education programs, the performance of educator preparation programs, public school finance, and the best practices of school districts with regard to classroom instruction, bilingual education programs, special language programs, and business practices. There may be an effect on small businesses. There may be anticipated economic cost to persons who are required to comply with the proposed new section. Persons and businesses requesting information from the education research centers may be required to pay a fee to the education research centers for the requested information, which will vary in amount depending on the size and complexity of the request.

The public comment period on the proposal begins October 19, 2007, and ends November 18, 2007. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposed new section submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register*.

The new section is proposed under the Texas Education Code, §1.005, which authorizes the commissioner of education and the Texas Higher Education Coordinating Board to adopt rules as necessary to implement education research centers and sharing student information, including rules for the use of student data at an education research center.

The proposed new section implements the Texas Education Code, §1.005.

§95.1001. Operation of Education Research Centers.

(a) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) FERPA--the Family Educational Rights and Privacy Act, 42 U.S.C. 1232g, including regulations and informal written guidance issued by the United States Department of Education and any amendments or supplementation thereof.

(2) Confidential information--as applied to data provided to an Education Research Center (ERC) by the Texas Education Agency (TEA) or the Texas Higher Education Coordinating Board (THECB) includes all student-level data, including any data cells small enough to allow identification of an individual student. All social security numbers, student names, student birthdates, and data cells containing between one and four students, inclusive, are confidential.

(3) Small data cells--any cell containing between one and four students inclusive. Information may not be disclosed where small data cells can be determined through subtraction or other simple mathematical manipulations or subsequent cross-tabulation of the same data with other variables. Institutions may use any of the common methods for masking including:

(A) hiding the small cell and the next larger cell on the row and column so the size of the small cell cannot be determined; or

(B) hiding the small cell and displaying the total for both the row and column as a range of at least ten; or

(C) any methodology approved by the TEA and THECB.

(4) Texas Higher Education Coordinating Board--References to the THECB shall also be deemed to include the commissioner of higher education.

(5) Texas Education Agency--References to the TEA shall also be deemed to include the commissioner of education.

(b) Purpose.

(1) ERCs may be established by joint approval of the commissioner of education and the THECB. An ERC may only be established at a sponsoring public institution of higher education (IHE) in Texas, but may be awarded to a consortium of such institutions. An ERC must be physically located within Texas and must retain all data at that location, except for secure off-site data back up in accordance with written procedures approved by the Joint Advisory Board described in subsection (c) of this section. Student level data may not be provided to a researcher at a location other than an ERC, the THECB, or a public IHE located in Texas that is an acknowledged consortium member of the ERC.

(2) The THECB is responsible for general oversight, technical assistance, and state support of ERCs, except as otherwise provided in this chapter. All policy decisions and rulemaking shall be jointly approved by the TEA and the THECB.

(3) Sponsoring IHEs are responsible for all equipment, salaries, and other operating costs of an ERC, including staff and equipment at the TEA and the THECB necessary to prepare and maintain data for the ERCs, as well as reasonable reimbursable expenses of the Joint Advisory Board. Costs will be limited to one full-time equivalent employee at each agency along with associated data storage costs as set by the Texas Department of Information Resources (DIR)

for the data center consolidation rates, unless otherwise agreed to by the TEA, the THECB, and the ERCs.

(c) Joint Advisory Board.

(1) The commissioner of education and the commissioner of higher education shall co-chair a Joint Advisory Board to review and approve research involving access to confidential information and to adopt policies governing ERC operations. Each commissioner may delegate to an agency employee the ability to act as co-chair and vote on matters coming before the Joint Advisory Board.

(2) The commissioner of education and the commissioner of higher education shall jointly appoint up to ten additional members to the Joint Advisory Board. All research involving access to confidential information must be approved by the Joint Advisory Board.

(3) Members of the Joint Advisory Board serve at the pleasure of the commissioner of education and the commissioner of higher education and must be reappointed annually. The Joint Advisory Board will post its agenda and conduct its meetings in compliance with the Texas Open Meetings Act.

(4) The Joint Advisory Board shall meet at the call of the two chairs at least twice each year.

(d) Operation.

(1) An ERC may operate only under written authorization by the commissioner of education and the THECB. Status as an ERC may not be assigned, delegated, or transferred to any other entity.

(2) An ERC shall be lead by a managing director who is a professional employee of the sponsoring IHE. The managing director shall report directly to the chief operating officer of the sponsoring IHE unless a different reporting structure is approved by the TEA and the THECB.

(3) All research at an ERC involving access to confidential information shall be conducted only with the approval of and under the joint oversight of the TEA and the THECB through the Joint Advisory Board. Research that does not involve access to confidential information may be conducted by the ERC without approval of the Joint Advisory Board upon 30 days notice to the TEA and the THECB and certification by the ERC that sufficient resources will be available to meet all demands for resources to conduct research or manipulate data under the direction of the Joint Advisory Board or on behalf of the TEA or the THECB.

(4) Confidential information provided to an ERC by the TEA or the THECB shall be protected by procedures to ensure that any unique identifying number is not traceable to any individual. Such procedures must be maintained as confidential by the TEA and the THECB and may not be shared with an ERC, or used for any other purpose. Under no circumstances may social security numbers, names, or birthdates be accessed for the purpose of research at an ERC.

(5) ERCs shall adopt written procedures for research conducted using confidential information, subject to approval by the Joint Advisory Board. An ERC may not access confidential information until all such procedures are approved. Such procedures shall include:

(A) measures to ensure against unauthorized disclosure of confidential information;

(B) independent review of all research products by a designated ERC staff person not involved in that specific project to ensure against unauthorized disclosure of confidential information;

(C) review of all datasets created by a researcher to ensure that confidential information is not copied or removed from the ERC;

(D) annual certification of full compliance with all requirements of state and federal laws and regulations regarding the use of confidential information for research purposes by the internal auditor of each participating IHE;

(E) approval of research design by an accredited IHE, including any applicable requirements for research involving human subjects, before submitting a research proposal to the Joint Advisory Board for approval; and

(F) criteria for allocating research access capacity for researchers not affiliated with the sponsoring IHEs.

(6) All research produced at an ERC shall:

(A) be made available upon request to the TEA and the THECB;

(B) be available for public distribution, copying, or reproduction at no cost to the TEA or the THECB;

(C) contain a disclaimer in a form acceptable to the TEA and the THECB stating that the conclusions of the research do not necessarily reflect the opinion or official position of those entities or of the State of Texas; and

(D) be reviewed before publication or other distribution by individuals other than those conducting the research to ensure that confidential information is not disclosed, in accordance with guidelines adopted under FERPA or by the TEA or the THECB.

(7) An ERC shall comply with the requirements of the Texas Public Information Act, including requirements relating to data manipulation. An ERC shall process any Public Information Act requests referred by the TEA or the THECB in a timely manner. Charges for processing Public Information Act requests shall be based on guidelines developed by the Texas Attorney General's Office and approved by the Joint Advisory Board.

(8) A sponsoring IHE shall cooperate fully with all audit requests made by the TEA or the THECB. Each ERC shall annually request and undergo a security audit performed by the Texas Department of Information Resources, or a contractor approved by that Department, which shall include a penetration test of computer equipment and access.

(9) Research projects that require access to data not then included in the database maintained by the THECB for research will be provided by the THECB or the TEA if available. An ERC will be charged the cost to process or manipulate such data. ERCs will be assessed for annual maintenance costs of the THECB and the TEA as approved by the Joint Advisory Board.

(e) Sanctions and termination.

(1) Upon a determination that confidential information has been released or has been copied to another location, or that appropriate security measures are not in place to protect confidential information, the Joint Advisory Board may require an ERC to obtain appropriate services or equipment or to remove confidential information from such other location in order to remedy a security deficit. Such services or equipment shall be purchased by the ERC from vendors subject to approval of the Joint Advisory Board.

(2) An ERC may be terminated by joint action of the TEA and the THECB for failure to meet the requirements of state or federal law, of this section, or of the terms of a contract establishing the ERC.

An ERC shall be entitled to an informal review of a determination to terminate its status by a designee of the commissioner of education and the commissioner of higher education prior to the effective date of the termination.

(3) Notice of termination under paragraphs (1) and (2) of this subsection shall be provided to the ERC's designated representative and shall contain information regarding the reasons for the termination.

(4) A termination made pursuant to this section shall become final and binding unless, within 30 days of its receipt of the notice of termination, the ERC invokes the administrative remedies contained in Chapter 1, Subchapter B, of this title (relating to Dispute Resolution).

(5) Any ultimate recommendation regarding termination shall be made to both the THECB and the commissioner of education. The THECB and the commissioner of education must concur for any termination of an ERC invoking such administrative remedies to become final.

(f) Security.

(1) An ERC must comply with all requirements of FERPA in accessing confidential information to conduct research. Notwithstanding any other provision in this subchapter, failure to maintain adequate security to avoid the unauthorized disclosure of confidential information provided to the ERC shall be grounds for immediate termination of the authorization to access such data.

(2) All physical locations at which confidential information may be accessed at an ERC must be located within Texas, at a sponsoring IHE, and approved by both the TEA and the THECB. Each ERC may provide for off-site data back up of information for disaster recovery purposes in accordance with the DIR processes. No research can be performed at a back-up site.

(3) Either the TEA or the THECB may suspend access to confidential information provided to an ERC based on a significant risk of unauthorized disclosure of confidential information.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
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For further information, please call: (512) 475-1497

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 10. TEXAS WATER DEVELOPMENT BOARD

CHAPTER 356. GROUNDWATER MANAGEMENT

The Texas Water Development Board (board) proposes amendments to §§356.1 - 356.7, 356.9, and 356.10; the repeal of §§356.11 - 356.13 and new §356.11 and §356.12 of Subchapter A, concerning Groundwater Management Plan Approval; the amendment to §356.22, dealing with the Designation of Groundwater Management Areas under Subchapter B; and new Subchapter C, §§356.31 - 356.35, addressing the Submittal of Desired Future Conditions; and new Subchapter D, §§356.41 - 356.46, to govern Appealing Approval of Desired Future Conditions.

The proposed changes are necessary to provide clarification, to improve grammar and readability, to define the processes and procedures associated with this chapter, and to better align the rules with existing statutory requirements contained in Chapter 36, Water Code, relating to Groundwater Conservation Districts. In particular, the reorganization and expansion of Chapter 356, including the creation of new Subchapters C and D, are being proposed by the board to provide a clearer organizational structure for the rules to benefit staff, members of the public, and groundwater conservation districts in their efforts to manage the groundwater resources of the state. The changes also reflect increased opportunity for public participation in the management of those resources. This rulemaking is undertaken as a result of the board's internal review and process identification. The changes are addressed in more detail below.

Proposed Amendments to 31 TAC Chapter 356, Subchapter A, relating to Groundwater Management Plan Approval:

The board proposes amendments to §§356.1 - 356.7, 356.9, and 356.10 to provide clarity and improve readability. The changes to §356.1 and §356.2 clarify the scope and referenced chapter of the Water Code. Unless otherwise identified below, amendments to §§356.2(2), (7), (10), (13), (17), (18), and (22), 356.4, 356.5(a), (a)(1)(H), (a)(4), and (a)(6) address minor, non-substantive changes by inserting clarifying words and punctuation that improve grammar and readability, by removing excessive wording, by inserting words that mirror statutory language, and by removing definitions that are not applicable to this chapter. Amendments to §356.6(a)(3) and (a)(5) improve readability and eliminate duplicative requirements. Changes to §356.7(c) and §356.10(b) are made to improve readability and to provide clarity. Additional language is added to §356.9 that references the subsection under which groundwater district management plans are developed to educate districts on the requirements of plan amendments. These amendments provide a more concise and understandable set of rules. The changes are meant to help groundwater districts and the public identify the process and procedures used by the board to implement its statutory obligations in approving groundwater management plans.

The board proposes renumbering §356.2(14) - (21), and §§356.6(a)(4), 356.12, and 356.13 to accommodate the removal and addition of other subsections. In particular, §356.2(13) and (22) are removed because the terms "inflows" and "total aquifer storage" are not used in the context of local groundwater resource management. Also, new subsection (a)(4) of §356.6 is added to align the groundwater management plan submittal requirements with those of §36.1071(a), Water Code, by requiring evidence of coordination with all surface water management entities in each groundwater district's boundaries at the time a district submits a management plan. Creation of new Subsection D, §§356.41 - 356.46, governing Appealing Approval of Desired Future Conditions, is the result of repealing §§356.11 - 356.13 in order to identify the specific procedures and requirements for appealing desired future conditions. The board proposes these changes to accurately reflect statutory requirements, to clearly organize the contents of the chapter for

ease of reference, and to accommodate expanded process and procedural requirements.

The board proposes amending §356.2(2) by adding "[A]n estimate of", "for at least the most recent five years that information is available", and "[I]t may include an estimate of exempt uses." As noted above, other changes are also made for clarity and readability. The proposed substantive changes recognize that estimated quantities of groundwater are acceptable contents of management plans because of the fluid nature of individual aquifers, the lack of data in a particular district, and ever-changing recharge or withdrawal conditions. Requesting that such information be reported for the most recent five years is necessary to establish trends and recognize patterns of usage for decision-makers. Finally, another substantive change states that groundwater usage estimates may include exempted uses. Exempted uses refers to usage from groundwater wells that are statutorily defined in §36.117(a) and (b), Water Code. Exemptions include usage from certain domestic, livestock, and poultry wells, wells used to supply rigs in actively exploring for oil or gas, and other categories of wells a groundwater district may decide to exempt. The reason for these changes is to encourage reporting of all groundwater usage in a uniform manner to better understand the hydrodynamics of district usage, to plan to accommodate such usage, and to also help ensure that the public is knowledgeable concerning groundwater usage in their district.

The board proposes amending §356.2(8) by adding "through at least the period that includes the current planning period for the development of regional water plans pursuant to §16.053, Water Code" to the definition of what constitutes a desired future condition. This change is necessary to ensure that desired future conditions are presented in a manner allowing for adequate consideration and usage in ongoing state water planning efforts. This information aids regional water planning group(s) efforts in performing their statutory mandate to develop strategies that meet identified needs. Strategies can then be incorporated into regional and state water plans. The purpose of this change is to ensure coordination and consistency among planning entities.

The board proposes amending §356.2(17) by removing "[I]ncludes, but is not limited to, a" language from the definition of a person having a legally defined interest in groundwater. Also, the board proposes to add "or granted by court order or judgment" to the same definition. As noted above, other changes are also made for clarity and readability. The board believes the removed language is redundant and that the same persons are covered with the remaining language. There is no intent to narrow such a definition. Instead, the board acts to ensure the definition is strengthened by specifically including persons whose groundwater interests have been adjudicated by a court. This change may result in the possible expansion of such an interest category and is therefore beneficial to both the public interest and the interests of private property holders. The reason for these changes is to better define the category of such interests and inform the public about who may qualify to file a petition seeking resolution to a conflict between a groundwater conservation district's management plan and the state water plan under §36.1072(g), Water Code, or appealing the approval of desired future conditions developed during joint planning efforts identified in §36.108(l), Water Code. This helps ensure that private property rights are recognized.

The board proposes amending §356.3 relating to the required groundwater district management plan by adding the statement "When a district reviews their management plan, the district must review and readopt a plan that complies with any revisions to Chapter 36 of the Water Code, that affect the content of a management plan." A groundwater district may review their management plan annually and must do so at least every five years. The additional language requires districts to recognize and comply with changes to Chapter 36, Water Code when readopting their plans. The board proposes this amendment to ensure that individual districts are aware of and consider any relevant statutory changes that may impact their management plans. This change is necessary to continue the uniform review and approval of management plans by the board as required by §36.1072(b), Water Code.

The board proposes to amend subsection (a)(5)(D) of §356.5 by adding the term "naturally" to modify "discharges from the aquifer". Natural discharge volumes are more helpful in developing groundwater management plans because they remove the impact of development from consideration in determining groundwater availability. Also, artificial discharge volumes through wells are accounted for under existing permit systems. This change helps clarify reporting requirements and helps to avoid over-accounting of discharge volumes for planning purposes. The change is necessary to develop a uniform methodology for accurately counting the natural discharge of relevant aquifers.

The board proposes amending §356.5(b) by adding "must be consistent with the established desired future conditions of the district's groundwater management area" and by striking "and the actions, procedures, performance and avoidance specified in subsection (a)(4) of this section are to be established by each district based on specific needs of that district and any parameters established by joint groundwater planning under §36.108, Water Code, when completed." Additionally, the board proposes to make non-substantive changes for clarity and readability and to more accurately direct users to the specific requirements already referenced. Together the additional language and the removal of a portion of the existing language are meant to economize the statutory requirement that an individual district's management plan must contain certain goals and objectives consistent with achieving the desired future conditions developed during joint planning efforts in a particular groundwater management area as required by §36.108(d-2) Water Code. The purpose of these changes is to better identify the elements of a management plan, to ensure coordination and consistency among districts operating in a common groundwater management area, and to avoid the suggestion of additional requirements associated with the removed language.

The board proposes amending subsection (a)(2) of §356.6 "or an amendment to a plan" to clarify that amendments to groundwater management plans are treated as if they are original plans. Both require a certified copy of the district's resolution adopting the plan or amendment to be submitted to the board whenever a district seeks board approval of its plan. This action is proposed in order to identify a procedure for §36.1071(g) and §36.1072(a), Water Code, which requires groundwater districts to develop and adopt management plans and submit those plans or amendments to the board for its approval.

The board proposes amending subsection (a)(4) of §356.6 by adding "evidence of coordination with all surface water management entities in the district's boundaries to the list of items to be submitted along with a groundwater district's management plan when a district seeks the board's approval of its plan. The board proposes to add the language to clearly identify and in-

form groundwater districts about board procedures. The additional language is based on §36.1071(a) Water Code, and had been omitted.

The board proposes to amend §356.9 by adding the sentence "[I]ncorporation of newly developed desired future conditions and managed available groundwater numbers may be adopted as an amendment." As noted above other changes are also made for clarity and readability. The added sentence is intended to emphasize that use of newly developed desired future conditions and newly released managed available groundwater numbers by a district can be considered and adopted as an amendment to a district's management plan. Under these circumstances, districts must seek board approval within 60 days of their adoption. The board proposes this language in order to encourage groundwater districts to formalize the use of desired future conditions and managed available groundwater numbers, to develop uniformity in district procedures throughout the state, to encourage public participation in the development of district plans, and to encourage the use of the best availability numbers by the districts during consideration of well permits.

Amendments to 31 TAC Chapter 356, Subchapter B, relating to Designation of Groundwater Management Areas:

The board proposes amendments to paragraphs (2) and (3) of §356.22 to provide clarity and improve readability. The changes are intended to be non-substantive. The change to §356.22(2) adds "as suitable for the management of groundwater resources" to the definition of groundwater management area. The change to §356.22(3) adds "surface" to the definition of groundwater. Both changes are made to accurately reflect the definitions provided in §36.001(5) and (13), Water Code. The changes are proposed to help groundwater districts and the public identify the process and procedures used by the board to implement its statutory obligations of designating groundwater management areas covering all major and minor aquifers in the state as identified in §35.004(a) and (c), Water Code. Designation of management areas is intended to help the joint planning and management efforts identified in §36.108, Water Code.

Proposed Amendments to 31 TAC Chapter 356, Subchapter C, relating to Submittal of Desired Future Conditions:

The board proposes to add new §§356.31 - 356.35 to address the procedural requirements for submitting the adopted desired future conditions required by subsections (a) - (d) of §736.108, Water Code which calls for joint planning among districts in a common groundwater management area. A desired future condition is defined in §356.2(8) of these rules and results in the development of managed available groundwater numbers that are generated by the board and used by individual groundwater conservation districts to develop district management plans and to aid in their permitting process. The districts must seek board approval of their management plans as identified in §36.1072, Water Code. The board realizes that a uniform process for submitting the conditions is desirable and necessary in order to properly, economically, and timely generate the managed available groundwater numbers that the districts will need to develop their management plans. It is also necessary to clearly identify the timeframe and supporting documentation which board staff must have in order to review submitted materials and develop managed available groundwater numbers.

The board proposes new §356.31 to define the subchapter's scope and provide a context for the submittal of desired future conditions. The board also proposes new §356.32 to identify the statutory source of the terms used. The terms used are defined in Chapters 35 and 36 of the Water Code. Both sections are necessary in order to provide a context and authority for subsequent rules in this subchapter.

The board proposes new §356.33 to provide notice about when desired future conditions need to be submitted to the board. The first date, September 1, 2010, is provided for by §36.108(d), Water Code, which requires groundwater conservation districts to establish their desired future conditions for relevant aquifers by that date and every five years thereafter. However, that date is too late for district efforts to be included in the upcoming state water plan due for release on January 5, 2012. This is because the regional water planning groups need managed available groundwater numbers well before September 1, 2010, to include them in their regional water plans. Therefore, the board is proposing an optional date of January 1, 2008, for submittal of desired future conditions to assure the use of managed available groundwater numbers in regional water plans. The purpose of this rule is to support timely and useful coordination among groundwater conservation districts, regional water planning groups, and board staff.

The board proposes new §356.34 to identify the contents of an adopted desired future conditions package that groundwater conservation districts submit to the board. The board uses the package to calculate managed available groundwater numbers. The board proposes new paragraphs (1) - (5) to specifically describe the contents of the submission package to include the desired future conditions themselves; copies of minutes and records establishing that the desired future conditions were adopted in accordance with the notice and voting requirements identified in §36.108(d-1), Water Code; a signed resolution of adoption from the groundwater district submitting the package; contact information; and any other information the executive administrator may require. Identifying this content is necessary to facilitate board review of desired future conditions and the development of managed available groundwater numbers by board staff. The purpose of this rule is to avoid waste of district and board resources and to assure a timely and complete review and application of the desired future conditions adopted by groundwater districts.

The board proposes new §356.35 to acknowledge receipt of a submitted desired future conditions package so that submitting districts are aware of receipt. Under this rule board staff would acknowledge receipt within 20 business days. This rule is proposed to provide certainty of status to the districts and to establish and, if necessary, to adjust internal board priorities. The latter may be necessary in the event there is an appeal of the adopted desired future conditions for the district's groundwater management area as contemplated in Subsection D below. This rule is intended to facilitate the processing of submitted desired future conditions and help allocate staff time.

Proposed Amendments to 31 TAC Chapter 356, Subchapter D, relating to Appealing Approval of Desired Future Conditions:

The board proposes to add new Subchapter D §§356.41 - 356.46, to address the procedural requirements needed to appeal an adopted desired future condition as outlined in subsections (l) - (o) of §36.108, Water Code, by certain statutorily defined categories and the board. A desired future condition is defined in §356.2(8) of these rules and results in the development and reporting of managed available groundwater numbers by the board that are used by individual groundwater conservation districts to develop district management plans

and as an aid in their well permitting process. An appeal may result in the need to revise a desired future condition, to consider additional public comment, and to develop new managed available groundwater numbers. Thus a board finding may impact a groundwater district's permitting efforts and the state's regional water planning efforts. The board realizes that a clear, timely application and a balanced approach in determining the reasonableness of a desired future condition is necessary to ensure the rights of the interest categories identified in §36.108 Water Code and that appeals are considered uniformly.

The board proposes new §356.41 to identify the scope of the chapter and its relationship to the Water Code. New §356.41 clearly states that the chapter governs the board's review, deliberations and findings challenging the approval of desired future conditions as described in subsections (l) - (o) of §736.208, Water Code. The purpose of the subsection is to inform interested parties about the location and contents of the chapter.

The board proposes new §356.42 relating to definitions to define certain terms for ease of use, to provide a frame of reference, and to otherwise establish a clear understanding of the subsequent rules. The proposed definitions do not otherwise occur in the Water Code and are meant solely to help petitioners understand the proposed procedural requirements of the subsequent subsections. The board proposes new §356.42(1) to simplify the interests who may appeal the approval of desired future conditions. The proposed definition refers to statutory language contained in §36.108(l), Water Code, which states "[A] person with a legally defined interest in the groundwater in the groundwater management area, a district in or adjacent to the groundwater management area, or a regional water planning group for a region in the groundwater management area may file a petition with the development board appealing the approval of the desired future conditions of the groundwater resources established under this section." Consolidation is necessary to avoid lengthy references. The board proposes new paragraph (2) to avoid unnecessarily long references to the multiple groundwater districts potentially impacted by the filing of a petition challenging the districts' adoption of a desired future condition. The definition is for convenience and is not intended to require a formal reply by the impacted districts. Any groundwater district in the groundwater management area may offer testimony as described by rule below. The board also proposes paragraph (3) to clarify that a petition must be in writing and must provide evidence that the districts adopting the desired future conditions for the groundwater management area did not establish a reasonable desired future condition. The purpose is to insure that potential petitioners are aware of the need for evidence to accompany a petition. This language reiterates the statutory requirement for accompanying evidence found in §36.108(l), Water Code. The board also proposes new paragraph (4) to clarify that the category of evidence is broad and includes any information supporting the petitioner's appeal and may be in the form of testimony, writings, or material objects. The purpose of such a rule is to encourage and allow a petitioner leeway to offer as much evidence as they may consider so long as it supports the appeal. Finally, the board proposes new (5) to help identify that a desired future condition is only reviewable after it is adopted under the joint planning requirements contained in §36.108(d-1) and (l), Water Code. This is necessary to avoid waste of resources assigned to review a desired future condition that may be subject to change. The statutory language mandates that a desired future condition be adopted by two-thirds vote at a joint planning meeting at which at least two-thirds of the districts in a groundwater management area attend. The statutory language also requires that the districts provide public notice for the adoption of a desired future condition. This subsection is intended to reiterate that a petition be based on final action by the districts participating in joint planning efforts so that the board may make its determination only after the issues involved are clearly defined and mature. Together these definitions provide a framework to educate a potential petitioner on the requirements for submitting a petition.

The board proposes new §356.43 relating to petitions appealing an adopted desired future condition to clarify when a petition and its accompanying evidence become reviewable by the board. Before the board will conduct a review and make a determination, this rule requires that certain timelines and conditions be met, describes the content of a petition, discusses the evidence associated with a petition, and identifies other procedural items including postponement, dismissal, and the joining of multiple petitions. This rule implements the process identified in subsections §36.108(m), (n) and (o), Water Code. In doing so it identifies and impacts certain rights and obligation for the parties involved, as discussed below.

The board proposes new subsection (a) of §356.43 to identify the circumstances under which a petition is reviewable. In subsection (a)(1), those circumstances obligate the petitioner to provide a copy of the petition and supporting documents to the district or districts whose desired future condition is being challenged 30 days prior to filing the petition with the board. This is intended to facilitate a possible settlement before a petition is filed and thus avoids the time and cost associated with requesting a final determination by the board. This also allows a potential respondent to narrow the issue(s) and develop its position. Doing so is expected to facilitate the appeal before the board. The 30 days are needed to allow enough time for districts to meet and act to resolve an issue. Adding subsection (a)(2) imposes a requirement that managed available groundwater numbers are actually available as a result of a desired future condition. Managed available groundwater numbers are determined by board staff using groundwater availability models and can only be provided once the board has had time to accommodate the conditions in a particular groundwater model. The proposed rule makes it clear that if such numbers are not available, then a filed petition is placed on hold until the numbers are available to the appropriate districts. This is necessary to identify a procedural condition to review, a determination of whether a desired future condition is physically possible. Adding subsection (a)(3) identifies a condition to review that requires a petition to be filed within a year of managed available groundwater numbers becoming available to the appropriate district. This is necessary so that the board may address all interests in a timely manner. The board anticipates that groundwater availability numbers will need certainty before use in groundwater permitting and planning efforts; the latter have similar five-year cycles which require ongoing coordination in order to develop strategies to be used in the state water plan. Finally, adding new subsection (a)(4) clarifies that previously considered substantive issues are not reviewable. This is necessary to avoid waste of state resources. The purpose of these requirements is to ensure the rights and interests of all parties are fully developed and identified to the board.

The board proposes adding new §356.43(b) to identify the contents of a petition appealing adopted desired future conditions. Thus subsection (b)(1) - (5) require relevant names, contact information, documentation supporting the petitioner's status, whether or not the petitioner is acting on behalf of an entity, documentation identifying and establishing the authority of the

petitioner to act, and a statement summarizing why the petitioner believes the desired future condition is unreasonable. These contents must be sworn to before a notary public. The purpose of this subsection is to consolidate into a single document the relevant information and to identify the interest and position of the petitioner. Having such a document acts to create a record that protects all interests. Also, this rule helps implement the requirement for a petition contained in §36.108(l), Water Code.

The board proposes new subsection (c) of §356.43 to clearly establish and inform a petitioner that a petition must be accompanied by supporting evidence and may include information on the decision adopting a desired future condition as well as information on the area's hydrology. This subsection also allows testimony to be in the form of affidavits that may be received until the end of a hearing or following the announcement of a schedule by the board. The purpose of this rule is to identify the materials necessary or helpful in resolving a petition and to provide a petitioner with the opportunity to offer additional evidence in the form of written testimony when such testimony may otherwise be inconvenient to offer. The rule also permits the executive administrator to ask for additional evidence to fully develop the background information necessary for better decision-making. Where a petitioner or district may not realize the value of certain information in their possession this is particularly important. Also, under proposed §356.34, districts are already obligated to provide background information regarding notice and voting information with their submittal of a desired future condition. This may also lead to other inquiries for additional background information.

The board proposes new §356.43(d) to provide an acknowledgment of receipt of the petition within 20 business days and to allow certain defined groundwater conservation districts in the petitioner's groundwater management area to make a written request for a 60 day postponement of board consideration of a petition if such a request is made within 30 days of the board's acknowledgement of receipt. The purpose of this subsection is to provide certainty of status regarding a petition and to offer either the petitioner's groundwater conservation district or, if the petitioner is not within the boundaries of a groundwater district, then any groundwater conservation district in the petitioner's management area an opportunity to resolve any issue(s) in advance of board consideration. This is necessary and helpful in avoiding waste of state resources in defining and investigating the issues identified by a petition and where there may still be an opportunity to resolve those issues. It accomplishes this by providing a possible total of 90 extra days to a requesting district. This rule reiterates and clarifies board efforts to encourage independent resolution of issues. It also helps maintain an identifiable and prompt timeline for board consideration of interests.

The board proposes new §356.43(e) to permit the executive administrator to combine multiple petitions appealing the adoption of a desired future condition if it results in a benefit to the board, the petitioners, and to any respondents. For example, the executive administrator may determine that joining petitions would result in more efficient and effective board review and thus promote early resolution to all petitions. Before making such a determination the executive administrator must conclude that the petitions or portions of the petitions concern the same groundwater management area, the same relevant aquifers, and the same issues. The executive administrator may join additional petitions up until resolution of the originally joined petitions. This rule is necessary to help ensure the most efficient use of state resources while providing for the swift resolution of the petitioner's interests. It also provides notice to all interested parties concerning the availability of this procedure.

The board proposes new §356.43(f) to allow the executive administrator an opportunity to remove and dismiss a petition from consideration by the board if it does not conform to the requirements addressed in subsections (a) - (c). It identifies this option in order to stress the need for completely developed issues and evidence in a way that promotes uniform and timely consideration and decision-making. The subsection is necessary to identify the process requirements to a potential petitioner and to conserve state resources.

The board proposes new §356.43(g) to allow the executive administrator the ability to decline a petition, or a portion of a petition, appealing the adoption of a desired future condition if an issue was previously addressed or otherwise resolved. This subsection avoids repetitive issues and promotes conservation of state resources.

The board proposes adding new §356.43(h) to clarify that managed available groundwater numbers must be available and released before the board can consider a petition. It also establishes a timeframe for consideration of the petition. This subsection requires that the board consider a petition within 120 days of either the acknowledgment of receipt and any postponement discussed in subsection (d) above or the release of the managed available groundwater numbers if those numbers were not available at the time the petition was filed. This rule is necessary to facilitate the consideration of any petition and is made to promote a timely resolution to the petition's issues. The purpose of the rule is to highlight the role that the generated numbers play verifying that a desired future condition is physically possible as described in the definition of such a condition under §356.2(8) above.

The board proposes new §356.44 to conveniently describe the nature and context of the public hearing associated with the petition process. Specifically, the board proposes to add subsection (a) to identify the statutory duty placed on the board to conduct a hearing to gather testimony on the petition in a central location in the groundwater management area. This duty is identified in §36.108(m), Water Code. The rule promotes full development and consideration of the issue(s) identified in a petition. The board also proposes adding subsection (b) to further promote public participation and testimony concerning the issue(s). Finally, the board proposes adding subsection (c) to clarify that the hearing is not a contested case hearing. The board has concluded that it does not have the authority to conduct a contested case hearing because the statutory language does not clearly grant such authority; because existing statutory language does not describe an adjudicative process where the final outcome is determinative of any one parties legal rights, duties or privileges as defined in "contested case" in §2001.003, Government Code; and because the statutory language in §36.108(m) of the Water Code describes a "public" hearing to gather testimony rather than specifically offering opposing parities an opportunity to present opposing facts and considerations at a hearing. This rule also mirrors the statutory language of §36.108(m), Water Code, by identifying that the board will provide a presiding officer who will open and conduct the hearing. These rules are necessary to describe the hearing process to all parties and to the public.

The board proposes adding §356.45 relating to the evaluation, consideration and deliberation of petitions to establish and identify to all parties, interests, and the public some of the guidance

the board may follow in evaluating, considering, and deliberating the petition and evidence described in §356.43 above. This subsection also identifies what constitutes a record for consideration by the board and clarifies that in the event an agreement is reached before the board makes a finding such an agreement must be put in writing and becomes a part of the record.

Specifically, subsection (a) of §356.45 obligates the executive administrator to prepare a summary and analysis of the record and its issues to the board. The executive administrator may also, but is not obligated to, provide a recommendation as part of that summary. Only an informed board can determine the reasonableness of an adopted desired future condition, and only the board may make findings identifying any recommended revisions. The board also proposes adding subsection (b) to identify what the record will consist of, including the petition and its accompanying evidence, the gathered testimony, and the summary and analysis prepared by the executive administrator. This is to consolidate and identify all of the evidence and issues for board consideration into one package to aid the board in its decision-making and to provide the public and any parties with a clear and concise understanding of what is being considered. The board also proposes adding subsection (c) to identify a procedure for removing a petition or a portion of a petition where an agreement is reached resolving all or part of the issue(s) presented or where a petitioner withdraws a petition. In such cases and before board consideration the executive administrator may dispose of it; however, once the board has begun considering a petition during a public meeting, then only the board may dispose of it. In either case a writing identifying the circumstances disposing of or withdrawing the petition is needed to identify the fact and help conclude the record. Finally, the board proposes adding subsection (d) to inform any interested party about the board's statutory duty to review a petition and any relevant evidence under §36.108(m), Water Code. Board action is intended to be based on the record identified and established in subsection (b) above. This rule also identifies some criteria, paragraphs (1) - (5), for use in evaluating and considering that record. The criteria may include considering whether an adopted desired future condition meets the definition by being physically possible; consideration of the socio-economic impact that may reasonably be expected to occur as a result of the adopted desired future condition; whether and to what extent there is an environmental impact resulting from the adopted desired future condition; consideration of any additional state policy or legislative directives; and any other information relevant to the specific desired future condition adopted during joint planning efforts for the particular groundwater management area identified in the petition. The board intends to evaluate any criteria using the staff and resources at its disposal. By identifying the criteria used to evaluate the reasonableness of an adopted desired future condition the board intends to illustrate that it will consider each petition in a balanced and uniform manner. This is necessary to give full and proper consideration to all interests and parties. This rule also provides a factual record and basis for the issuance of findings and, if necessary, recommended revisions to justify the board's decision-making authority.

Finally, the board proposes adding §356.46 relating to board findings and recommended revisions to implement a process outlined in §36.108(n) and (m) of the Water Code to address changes to a district management plan as a result of the board recommending revisions to an adopted desired future condition for an aquifer. This is necessary to close the record and to identify both the internal and external mechanisms for implementing those changes; this subsection also consolidates the statutory requirements for ease of reference. The board proposes adding subsection (a) to comply with the Code requirement to submit a report to the districts that includes a list of findings and recommended revisions and directing the districts to prepare a revised plan in accordance with the board's recommendations. The board proposes adding subsection (b) to clearly identify the districts' duty to hold at least one public hearing at a central location in the groundwater management area at which districts present revisions made in accordance with board recommendations and gather additional public comments. These steps track statutory language and are necessary to continue to promote public participation as identified in §36.108(d-1) and (n), water code. The board proposes adding subsection (c) of §356.46 to clarify that the respondent districts must consider all comments and shall prepare revisions based on those comments that reflect substantially the recommendations of the board. The respondent districts must then submit the revisions of their desired future conditions to the board for final review and approval. This rule is necessary to provide a terminal step in the review process and thus assure all parities that their interests have been addressed. And the board proposes to add subsection (d) to identify the executive administrator's duty to provide the districts in the groundwater management area and any impacted regional water planning groups with managed available groundwater numbers based on any revised desired future conditions.

Melanie Callahan, Chief Financial Officer, has determined that for the first five-year period the sections are in effect, there will be no fiscal implications to state or local government as a result of administration of the proposed sections.

Ms. Callahan has also determined that, for the first five years the proposal is in effect, the public benefit anticipated as a result of the proposed sections will be the clarification of the amended rules and the identification of both internal and external processes. There will be no economic costs to small businesses or individuals required to comply with the proposal.

Comments on the proposal will be accepted for 30 days following publication and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by e-mail to rulescomments@twdb.state.tx.us, or by fax at (512) 463-5580.

SUBCHAPTER A. GROUNDWATER MANAGEMENT PLAN APPROVAL

31 TAC §§356.1 - 356.7, 356.9 - 356.12

The amendments and new rules are proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, including Texas Water Code §§35.004(d), 36.1071 - 36.1073, and 36.108(m), (n), and (o) which direct the board to assist and review in the development of groundwater district management plans, to approve plans properly adopted and submitted to the board, and to consider appeals of desired future conditions of groundwater resources.

Texas Water Code, Chapter 36, Subchapters D and E are affected by this proposal.

§356.1. Scope of Subchapter.

This subchapter governs the board's procedures for reviewing and approving management plans as administratively complete, dealing with

and resolving conflicts between management plans and the state water plan, and data collection training and reporting by districts.

§356.2. Definitions of Terms.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Texas Water Code, Chapter 36, Groundwater Conservation Districts, that are not defined here shall have the meanings provided in Chapter 36.

(1) Administratively complete--A plan is considered administratively complete when it contains the information required by §36.1071(a) and (e) of the Texas Water Code.

(2) Amount of groundwater being used on an annual basis--An estimate of the [~~--The~~] quantity of groundwater annually withdrawn or flowing from wells in an aquifer for at least the most recent five years that information is available. It may include an estimate of exempt uses [~~naturally or artificially on an annual basis~~].

(3) Adopted state water plan--A water plan developed pursuant to Texas Water Code, §16.051 and which has been adopted by the board.

(4) Artificial recharge--Increased recharge accomplished by the modification of the land surface, streams, or lakes to increase seepage or infiltration rates or by the direct injection of water into the subsurface through wells.

(5) Board--Texas Water Development Board.

(6) Conflict--A situation where the managed available groundwater identified in a management plan or the adopted state water plan is not the managed available groundwater based on the desired future conditions set by the groundwater conservation districts in the groundwater management area.

(7) Conjunctive use [~~surface water management~~] issues--Issues relating to the combined use of groundwater and surface water sources that optimize the beneficial characteristics of each source [~~active use of both surface water and groundwater to achieve increased water supply or enhanced water quality~~].

(8) Desired future conditions--The desired, quantified condition of groundwater resources (such as water levels, water quality, spring flows, or volumes) at a specified time or times in the future, through at least the period that includes the current planning period for the development of regional water plans pursuant to §16.053, Texas Water Code, or in perpetuity, as defined by participating groundwater conservation districts within a groundwater management area as part of the joint planning process. Desired future conditions have to be physically possible, individually and collectively, if different desired future conditions are stated for different geographic areas overlying an aquifer or subdivision of an aquifer.

(9) Discharge--The amount of water that leaves an aquifer by natural or artificial means.

(10) District--Any district or authority created under Texas Constitution, Article III, §52, or Article XVI, §59, that has the authority to regulate the spacing of water wells, the production from water wells, or both.

(11) Estimates--Calculations using best available data and methodologies specified in the management plan such that the quantifications will be reasonable for use by the district and can be tracked over time.

(12) Executive administrator--The executive administrator of the board.

[~~(13) Inflows--The amount of water that flows into an aquifer from another formation.~~]

(13) [~~(14)~~] Managed available groundwater--The amount of water that may be permitted by a district for beneficial use in accordance with the desired future condition of the aquifer.

(14) [~~(15)~~] Management goals--The qualitative and quantitative ends toward which a district directs its efforts.

(15) [~~(16)~~] Management plan--The groundwater management plan required pursuant to Texas Water Code, §36.1071.

(16) [~~(17)~~] Most efficient use of groundwater--Those practices, techniques and technologies that the district determines will provide the least consumption of groundwater for each type of use balanced with the benefits of using groundwater.

(17) [~~(18)~~] Person with a legally defined interest in groundwater [~~in a district~~]--A [~~Includes, but is not limited to, a~~] person who owns land or groundwater rights in the district, has a legal interest in a well in the district, [~~or~~] has authorization from or an application pending with the district to produce groundwater, or granted by court order or judgment.

(18) [~~(19)~~] Projected water demand--The quantity of water needed on an annual basis [~~per annum~~] for beneficial use during the period covered by the management plan. The demands shall be projected for the types of use that are included in the state water plan. Each type of use may be subdivided into sub-types by the district.

(19) [~~(20)~~] Recharge--The amount of water that infiltrates to the water table of an aquifer.

(20) [~~(21)~~] Surface water management entities--Political subdivisions as defined by Texas Water Code, Chapter 15, and identified from Texas Commission on Environmental Quality records which are granted authority to store, take, divert, or supply surface water either directly or by contract under Texas Water Code, Chapter 11, for use within the boundaries of a district.

[~~(22) Total aquifer storage--The total calculated volume of groundwater that an aquifer is capable of producing, which is calculated by multiplying the current volume of the aquifer by its specific yield at the time of submitting the management plan.~~]

§356.3. Required Management Plan.

As required by Texas Water Code, §36.1071 and §36.1072, a district shall submit to the executive administrator a management plan that meets the requirements of §356.5 of this title (relating to Required Content of Management Plan). The management plan shall be submitted not later than three years after the creation of the district or, if the district requires confirmation, not later than three years after the election confirming the district. The district may review the plan annually, and must review and readopt the plan, with or without revisions, at least once every five years and resubmit the management plan for approval pursuant to §356.5 of this title (relating to Required Content of Management Plan) and §356.6 of this title (relating to Plan Submittal). When a district reviews their management plan, the district must review and readopt a plan that complies with any revisions to Chapter 36 of the Texas Water Code that affect the content of a management plan.

§356.4. Sharing with Regional Water Planning Groups.

Each district shall forward a copy of its approved management plan tothe chair of each regional water planning group with territory within the district's boundaries. [~~:~~]

[(1) the chair of each regional water planning group with territory within the boundaries of the district for that region's use in its planning process; and]

[(2) the chair of any regional water planning group to which the board instructs the district to send a copy of its approved management plan. The board will only require a district to send a copy of its management plan to a regional water planning group that does not have territory within the boundaries of the district if that regional water planning group plans to use water within the district to meet a water need.]

§356.5. Required Content of Management Plan.

(a) A management plan shall contain, unless explained as either not applicable or not cost-effective, the following elements: [The management plan shall contain the following elements. If the management plan does not contain one or more of the listed elements, it must explain how the required element is either inappropriate or not cost-effective:]

(1) management goals:

(A) providing the most efficient use of groundwater;

(B) controlling and preventing waste of groundwater, which may include the waste of groundwater through contamination induced by abandoned oil and gas wells, abandoned water wells, leaking pipelines, and other sources;

(C) controlling and preventing subsidence;

(D) addressing conjunctive surface water management issues;

(E) addressing natural resource issues which impact the use and availability of groundwater, and which are impacted by the use of groundwater;

(F) addressing drought conditions;

(G) addressing conservation, recharge enhancement, rainwater harvesting, precipitation enhancement, or brush control, where appropriate and cost-effective; and

(H) addressing, in a quantitative manner, the desired future conditions of the groundwater resources established [selected] pursuant to §36.108, Texas Water Code, provided such desired future conditions have been identified at the time the management plan is submitted to the board for approval;

(2) management objectives that the district will use to achieve the management goals in paragraph (1) of this subsection. Management objectives are specific, quantifiable, and time-based statements of desired future accomplishments or outcomes, each linked to a management goal, which set the individual priority for district strategies. Each desired future accomplishment or outcome must be the result of actions that can be taken by district staff or assigns;

(3) performance standards for each management objective. Performance standards are indicators or measures used to evaluate the effectiveness and efficiency of district activities by quantifying the results of actions. Evaluation of the effectiveness of district activities measures the accomplishments of the district. Evaluation of the efficiency of district activities measures how well resources are used to produce an output, such as the amount of resources devoted per unit of accomplishment;

(4) actions, procedures, performance, and avoidance, all specified in as much detail as practicable, including the rules that are necessary to effectuate the management plan. An active and up-to-date website address for any proposed and existing rules may be substituted for the rules portion of this element [including specifications and the Internet address for all proposed rules];

(5) estimates of:

(A) managed available groundwater in the district, based on the desired future condition selected pursuant to §36.108, Texas Water Code, provided that the desired future conditions have been identified at the time the management plan is submitted to the board for approval;

(B) the amount of groundwater being used within the district on an annual basis;

(C) the annual amount of recharge from precipitation, if any, to the groundwater resources within the district;

(D) for each aquifer, the annual volume of water that naturally discharges from the aquifer to springs and any surface water bodies, including lakes, streams, and rivers;

(E) the annual volume of flow into and out of the district within each aquifer and between aquifers in the district, if a groundwater availability model is available;

(F) the projected surface water supply in the district according to the most recently adopted state water plan; and

(G) the projected total demand for water in the district, according to the most recently adopted state water plan;

(6) details of how the district will manage groundwater supplies in the district, including a methodology by which the [a] district will track its progress on an annual basis in achieving its management goals; and

(7) consideration of water supply needs and water management strategies included in the adopted state water plan.

(b) The management goals, performance standards and management objectives required in subsection (a)(1), (2), and (3) of this section must be consistent with the established desired future conditions of the district's groundwater management area [and the actions, procedures, performance and avoidance specified in subsection (a)(4) of this section are to be established by each district based on specific needs of that district and any parameters established by joint groundwater planning under §36.108, Water Code, when completed]. Each district shall use the district's best available data and information [available to it], including its [an] existing groundwater management plan [of the district], to make the estimates required in subsection (a)(5) of this section and to develop the plan required by these rules. The [, except that the] district shall use the groundwater availability modeling information provided by the executive administrator in conjunction with any available site-specific information provided by the district to the executive administrator for review and comment before being used in the management plan when developing the estimates required in subsection (a)(5)(C), (D), and (E) of this section.

§356.6. Plan Submittal.

(a) A district requesting approval of its management plan shall submit to the executive administrator the following:

(1) one hard copy and one electronic copy of the adopted management plan;

(2) a certified copy of the district's resolution adopting the plan or an amendment to a plan or other evidence of the district's official action to adopt the plan;

(3) an active and up-to-date website address at which the proposed and any existing rules may be viewed, although a hard copy

of such rules may be substituted [~~unbound copy of all existing district rules and the Internet address for all proposed rules~~];

(4) evidence of coordination with all surface water management entities in the district's boundaries; and

(5) [~~(4)~~] evidence that the plan was adopted after notice hearing. [~~; and~~]

[~~(5) evidence of the desired future conditions developed from joint planning in the groundwater management area under §36.108, Water Code, provided that the desired future conditions have been identified prior to the management plan being submitted to the board for approval.~~]

(b) The plan or revised plan under §356.7 of this title (relating to Approval) shall be considered properly submitted to the board when all of the items specified in subsection (a) of this section are received in the Austin offices of the board. Once a management plan or amendment is properly submitted to the board, the time lines of §356.7 of this title begin.

§356.7. Approval.

(a) Within 60 days of receipt of a properly submitted management plan, readopted plan, or amendments as specified in §356.6(b) of this title (relating to Plan Submittal), the executive administrator shall approve the plan as administratively complete if it complies with the requirements of §§356.5(a)(1) through 356.5(a)(5) and §356.5(a)(7) of this title (relating to Required Content of Management Plan). The executive administrator may waive the requirement of §356.5(a)(7) when justified. Upon approval, the executive administrator shall notify the district in writing of the determination.

(b) If approval is denied, the executive administrator shall include written reasons for the denial with the notice of denial. If the executive administrator denies approval, the district may submit a revised management plan for review and approval within 180 days from receipt of notice that the executive administrator has denied approval. The review and approval of a revised management plan must comply with all the requirements of this chapter pertaining to the review and approval of originally submitted management plans.

(c) An approved [~~Approval of a~~] management plan remains in effect until:

(1) the district fails to timely readopt a management plan;

(2) the district fails to timely submit the district's readopted management plan to the executive administrator; or

(3) the executive administrator determines that the readopted management plan does not meet the required approval, and the district has exhausted all appeals to the board or appropriate court.

§356.9. Approval of Amendments.

A district shall submit all amendments to the management plan developed under §356.5 of this title (relating to the Required Content of a Management Plan) to the executive administrator [~~board~~] within 60 days of adoption of the amendment by the district's board. Amendments shall be submitted either in the form of an addendum to the management plan or as changes highlighted within the entire management plan. If the amendment is significant and not merely a minor correction of an error, the amendment should be in the form of an amended plan instead of an addendum to avoid confusion and preserve the integrity of the plan. Amendments must be submitted in accordance with §356.6 of this title (relating to Plan Submittal). Incorporation of newly developed desired future conditions and managed available groundwater numbers may be adopted as an amendment.

§356.10. Possible Conflicts with State Water Plan.

(a) A person with a legally defined interest in groundwater in a district or the regional water planning group may file a written petition with the executive administrator [~~board~~] stating that a conflict requiring resolution may exist between the district's approved groundwater conservation district management plan developed under Texas Water Code, §36.1071, and the state water plan developed under Texas Water Code, §16.051. A copy of the petition shall be provided to the district and to the chairperson of any involved regional water planning group. The petition must state:

(1) the specific nature of the conflict;

(2) the specific sections and provisions of the approved management plan and the state water plan that are in conflict, and

(3) the proposed resolution to the conflict.

(b) The [~~If the~~] executive administrator shall determine if a conflict exists. If [~~determines that~~] a conflict does exist, the executive administrator will provide technical assistance to and facilitate coordination between the affected parties. Coordination may include any of the following processes:

(1) requiring the affected parties to respond to the petition in writing;

(2) meeting with representatives from the affected parties to informally mediate the conflict; and/or

(3) coordinating a formal mediation session between representatives of the affected parties.

(c) If the conflict has not been resolved within 45 days of the date the person or regional water planning group filed the petition with the executive administrator [~~board~~], the parties may request mediation. The parties may request the assistance of the Center for Public Policy Dispute Resolution at The University of Texas School of Law or an alternative dispute resolution system established under Chapter 152, Civil Practice and Remedies Code, to obtain a qualified, impartial third party to mediate the matter. The cost of the mediation services must be specified in the agreement between the parties and the mediation services provider. If the parties cannot resolve the conflict through mediation, the board shall resolve the conflict by the 60th day after the date mediation is completed. To resolve the conflict, the executive administrator will recommend a resolution to the conflict to the board. Before presenting the issue to the board, the executive administrator will provide the affected parties 15 days notice. The board shall adopt a resolution to the conflict at a public meeting. Resolution may include requiring a revision to the groundwater conservation district's approved management plan or consolidating the resolution with an action being taken by the board pursuant to §357.15 of this title (relating to Interaction with Groundwater Conservation District Management Plans).

(d) If the board requires a revision to the district's approved management plan, the board shall provide information to the district on the revisions that are required and why. The district shall prepare any revisions based on the information provided by the board and hold, after notice, at least one public hearing at a central location within the district. The district shall consider all public and board comments, prepare, revise, and adopt its plan, and submit the revised plan to the board for approval pursuant to this subchapter.

(e) At the request of either the district or the affected regional water planning group, the board shall include in the state water plan a discussion of the conflict and its resolution.

(f) If the district disagrees with the decision of the board, the district may appeal the decision to a district court in Travis County.

§356.11. Training on Data Collection Methodology.

If requested by a district in writing to the executive administrator, the board shall provide the district training on basic data collection methodology and reporting and provide technical assistance, including basic data collection and reporting methodology.

§356.12. Data Collected by the District.

Upon written request of the executive administrator, a district shall provide any data collected by the district to the executive administrator in a format acceptable to the executive administrator. The executive administrator shall provide to the districts a list of acceptable formats for reporting by the districts.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704726
Joe Reynolds
Attorney
Texas Water Development Board
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 936-2414

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31 TAC §§356.11 - 356.13

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of these sections is proposed under the authority of §6.101, Texas Water Code, which provides the board with the authority to adopt rules necessary to carry out the powers and duties of the board.

Texas Water Code, Chapter 36, Subchapters D and E are affected by this proposal.

§356.11. Appealing Approval of the Desired Future Conditions of the Groundwater Resources.

§356.12. Training on Data Collection Methodology.

§356.13. Data Collected by the District.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Joe Reynolds
Attorney
Texas Water Development Board
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SUBCHAPTER B. DESIGNATION OF GROUNDWATER MANAGEMENT AREAS

31 TAC §356.22

The amendments are proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, including Texas Water Code §§35.004(d), 36.1071 - 36.1073, and 36.108(m), (n), and (o) which direct the board to assist and review in the development of groundwater district management plans, to approve plans properly adopted and submitted to the board, and to consider appeals of desired future conditions of groundwater resources.

Texas Water Code, Chapter 36, Subchapters D and E are affected by this proposal.

§356.22. Definitions of Terms.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Texas Water Code, Chapter 35, Groundwater Studies, and not defined here shall have the meanings provided in Chapter 35.

(1) Board--The Texas Water Development Board.

(2) Groundwater management area--An area designated and delineated by the Texas Water Development Board as suitable for the management of groundwater resources.

(3) Groundwater--Water percolating below the earth's surface [~~earth~~].

(4) Groundwater reservoir--A specific subsurface water-bearing reservoir having ascertainable boundaries containing groundwater.

(5) Aquifer--Groundwater reservoir as defined in paragraph (4) of this section [~~subsection~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Joe Reynolds
Attorney
Texas Water Development Board
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 936-2414

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SUBCHAPTER C. SUBMITTAL OF DESIRED FUTURE CONDITIONS

31 TAC §§356.31 - 356.35

The new sections are proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, including Texas Water Code §§35.004(d), 36.1071 - 36.1073, and 36.108(m), (n), and (o) which direct the board to assist and review in the development of groundwater district management plans, to approve plans properly adopted and submitted to the board, and to consider appeals of desired future conditions of groundwater resources.

Texas Water Code, Chapter 36, Subchapters D and E are affected by this proposal.

§356.31. Scope of Subchapter.

This subchapter shall serve and identify the board's requirements and process for submitting desired future conditions developed by joint planning efforts pursuant to the requirement of Texas Water Code, §36.108.

§356.32. Definitions of Terms.

The words and terms used in this subchapter shall have the meanings defined in Texas Water Code, Chapter 35, Groundwater Studies, and Chapter 36, Groundwater Conservation Districts.

§356.33. Submission Date.

Groundwater conservation districts shall submit desired future conditions of the groundwater resources in their groundwater management area to the executive administrator before September 1, 2010, and at least every five years thereafter. Those districts opting to adopt desired future conditions in time to be incorporated into the next state water plan due in 2012 should submit such conditions by January 1, 2008.

§356.34. Submission Package.

Districts must include the following when submitting an adopted desired future condition to the board:

(1) the desired future condition of the aquifer in the groundwater management area (multiple desired future conditions for the same aquifer in a groundwater management area need to be compatible);

(2) copies of the groundwater management area meeting postings and minutes, with the complete voting record by member, of the groundwater management area's public meetings at which the desired future conditions were adopted;

(3) a resolution signed by the groundwater management area member district representatives adopting the desired future conditions;

(4) the name of a designated representative of the groundwater management area for board staff to contact as necessary; and

(5) any other information the executive administrator or designee may require.

§356.35. Acknowledgment.

Board staff shall acknowledge receipt of submitted packages that are administratively complete within 20 business days of receipt.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Joe Reynolds
Attorney
Texas Water Development Board
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For further information, please call: (512) 936-2414

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SUBCHAPTER D. APPEALING APPROVAL OF DESIRED FUTURE CONDITIONS

31 TAC §§356.41 - 356.46

The new sections are proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, including Texas Water Code §§35.004(d), 36.1071 - 36.1073, and 36.108(m), (n), and (o) which direct the board to assist and review in the development of groundwater district management plans, to approve plans properly adopted and submitted to the board, and to consider appeals of desired future conditions of groundwater resources.

Texas Water Code, Chapter 36, Subchapters D and E are affected by this proposal.

§356.41. Scope of Subchapter.

This subchapter governs the board's review, deliberations, and findings related to an appeal challenging the approval of desired future conditions established by Texas Water Code, §36.108.

§356.42. Definitions.

Words and terms used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise:

(1) Petitioner--A person who appeals the approval of a desired future condition. A person may appeal if they have a legally defined interest in groundwater identified in §36.108(l), Texas Water Code.

(2) Respondent--Refers to the groundwater conservation districts in the groundwater management area identified in a petition.

(3) Petition--The written request with evidence submitted to the board seeking a determination regarding the reasonableness of adopted desired future conditions.

(4) Evidence--Information supporting the petitioner's appeal. Evidence may include testimony, written materials, or material objects.

(5) Adopted Desired Future Conditions--Desired future conditions adopted by two-thirds vote of the districts' representatives present at a joint planning meeting at which at least two-thirds of the districts located in whole or in part in the groundwater management area have a voting representative in attendance and for which all such districts provide notice in accordance with Chapter 551, Texas Government Code.

§356.43. Petition and Evidence.

(a) A petition is reviewable by the board when:

(1) the petitioner has provided the districts, whose desired future condition is being challenged, with a copy of the petition and supporting documentation at least thirty (30) days prior to filing an appeal with the Board;

(2) the managed available groundwater number is available for the adopted desirable future condition; if the managed available groundwater number is not available, then the petition shall be held in abeyance until that number is available to the board and the districts;

(3) not more than one year has passed since the managed available groundwater number has been delivered to the districts; and

(4) the substantive issues raised in the petition have not been previously reviewed by the board or the districts whose proposed desired future condition is being appealed.

(b) A petition shall be signed by the petitioner and sworn to before a notary public and shall state the following:

(1) the name of the petitioner and any agent;

(2) contact information for the petitioner and any agent or representative;

(3) documentation of the petitioner's legally defined interest in the groundwater in the area except for those petitioners that are

either a groundwater district in the groundwater management area or a regional water planning group for a region in the area;

(4) in instances where the petitioner is acting on behalf of an entity or group, a certified copy of a resolution or other official document verifying the petitioner's authority, identifying the representative, and authorizing the action on the entity or group's behalf; and

(5) a statement summarizing why the petitioner believes the adopted desired future condition is unreasonable.

(c) A petition shall be accompanied by evidence supporting the petitioner's appeal. The executive administrator may request additional information from either the petitioner or the respondent. Accompanying evidence may include information related to the decision adopting the desired future condition as well as information related to the hydrology and uses of relevant aquifers. Testimony may be submitted in the form of affidavits and may be received until the end of a hearing or following any announced schedule.

(d) The executive administrator shall acknowledge receipt of a petition within 20 business days. On written request by the petitioner's groundwater conservation district or, if the petitioner is not within a groundwater conservation district, by any district within the petitioner's groundwater management area made within 30 days of board acknowledgment the executive administrator may postpone board consideration and encourage resolution for up to 60 days.

(e) The executive administrator may join multiple petitions concerning the same area, aquifers and issues if such joinder is beneficial to the board, the petitioners, and the respondent.

(f) The executive administrator may dismiss a petition for failure to conform to the requirements of this subchapter.

(g) The executive administrator may decline to consider a petition if he or she determines that the issue and concern of a petitioner was previously addressed or otherwise resolved.

(h) If managed available groundwater numbers have been released at the time a petition is filled, the petition shall be presented for consideration to the board no later than 120 days after acknowledgment of receipt of the petition except in cases where a district requests postponement in accordance with subsection (d) of this section where the petition shall be presented for consideration to the board no later than 120 days after the postponement period. If managed available groundwater numbers have not been released at the time a petition is filed, the petition shall be presented for consideration to the board no later than 120 days after the transmittance of managed available numbers.

§356.44. Hearing and Testimony.

(a) The executive administrator shall conduct a hearing to gather testimony on the petition. The hearing shall be conducted at a central location in the groundwater management area.

(b) Notice of the hearing shall be published in the Texas Register.

(c) This hearing is not a contested case hearing. The presiding officer shall open the hearing by making a concise statement of its scope and purpose and then proceed to take relevant testimony.

§356.45. Board Evaluation, Consideration, and Deliberation.

(a) The executive administrator shall prepare a summary and analysis and may make recommendations to the board for their consideration.

(b) The petition and submitted evidence along with testimony, summary, and analysis and any recommendations shall constitute the record for consideration and deliberation by the board at a regularly scheduled meeting.

(c) Prior to consideration by the board, the executive administrator may dispose of the petition if an agreement is reached resolving the petition or a petition has been withdrawn. The board may do likewise during their deliberations and may otherwise table any findings and recommended revisions for consideration at a later date. Any agreements shall become a part of the record.

(d) The board shall consider, deliberate, and weigh the record before it in making any findings and recommended revisions regarding the reasonableness of the desired future conditions. In doing so, the board may consider the following criteria:

(1) whether the adopted desired future conditions are physically possible and the consideration given groundwater use;

(2) any socio-economic impact reasonably expected to occur;

(3) any environmental impacts, including but not limited to impacts to spring flow or other interaction between groundwater and surface water;

(4) state policy and legislative directives; and

(5) any other information relevant to the specific condition.

§356.46. Findings and Recommended Revisions.

(a) The board shall issue written findings and, if necessary, recommended revisions to the respondent. If revisions are recommended, then the respondent shall prepare revised desired future conditions for further consideration.

(b) The respondent shall, after notice and public hearing at a central location in the area, present the desired future conditions revised according to the board's recommendations and solicit public comment.

(c) The respondent shall consider all comments and shall prepare revisions to the desired future conditions as necessary that reflect substantially the recommendations of the board. The respondent shall submit these revisions for final review and approval by the board.

(d) The executive administrator shall provide the appropriate districts and regional water planning groups with the managed available groundwater based on the final and approved revisions identified in subsection (c) of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704721
Joe Reynolds
Attorney
Texas Water Development Board
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 936-2414

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CHAPTER 363. FINANCIAL ASSISTANCE PROGRAMS

The Texas Water Development Board (board) proposes amendments to 31 TAC §§363.1, 363.2, 363.11 - 363.16, 363.18, 363.32, 363.33, 363.41 - 363.43, and 363.55 and new §363.19 of Subchapter A, relating to General Provisions, to ensure consistency with recent statutory amendments made to Chapter 16, Texas Water Code, relating to the State Participation Program

and the Water Infrastructure Fund, and with other board rules relating to the processing of applications for financial assistance. The specific provisions being amended and the reasons therefore are addressed in more detail below.

The board proposes to repeal 31 TAC §§363.201, 363.202, 363.204 - 363.209, 363.221 - 363.226, 363.241, and §363.242 of Subchapter B, relating to the State Water Pollution Control Revolving Fund program, because these rules have been superseded by the board's adoption of rules in 31 TAC Chapter 375, relating to the Clean Water State Revolving Fund and are, therefore, no longer necessary.

The board proposes amendments to 31 TAC §§ 363.502 - 363.505, and 363.507 and new §363.512 of Subchapter E, concerning the Economically Distressed Areas Program (EDAP). The amendments are proposed in response to legislation passed during the 80th Legislature, to correct inconsistencies in the current rules and to align funding of EDAP projects with the state water plan. The specific provisions being amended and the reasons therefore are addressed in more detail below.

The board proposes to amend 31 TAC §§363.1002 - 363.1004, 363.1006, 363.1007, 363.1014, and 363.1017 of Subchapter J, relating to the State Participation Program, to reflect recent statutory amendments, to outline the prioritization process that will be used in ranking projects seeking financial assistance from the State Participation Program and to better define the procedures that will be used by the board when it processes these applications for financial assistance. The specific provisions being amended and the reasons therefore are addressed in more detail below.

Finally, The board proposes to add new Subchapter L, §§363.1201 - 363.1210, relating to the Water Infrastructure Fund, to implement certain recent statutory amendments relating to the Water Infrastructure Fund and to ensure consistency with the board's other funding program rules. These new rules are addressed in more detail below.

Proposed Amendments to 31 TAC Chapter 363, Subchapter A (relating to General Provisions).

The proposed amendment to paragraph (1)(B) of §363.1 (relating to Scope of Subchapter) deletes the reference to the state water pollution control revolving fund created pursuant to Chapter 15, Subchapter J, Texas Water Code, because the requirements relating to the State Water Pollution Control Revolving Funds found in 31 TAC Chapter 363 have been superseded by the rules adopted by the board in 31 TAC Chapter 375, relating to the Clean Water State Revolving Fund program. The rules set forth in Chapter 363, Subchapter B, are, therefore, no longer necessary. The remaining subparagraphs of §363.1(1) have been relettered to reflect the deletion of this provision. In addition, a new paragraph (1)(E) of §363.1 has been added to reference the Water Infrastructure Fund established in Chapter 15, Subchapter Q, Texas Water Code. Finally, the board proposes to subdivide paragraph (3) of §363.1 into subparagraphs for purposes of clarifying the board's assistance programs under Chapter 17, Texas Water Code.

The proposed amendments to §363.2 (relating to Definitions of Terms) revise the definition of "Corporation" to reference Chapter 67, Texas Water Code, rather than Chapter 49, Texas Water Code (formerly Article 1434a, Vernon's Texas Civil Statutes), as the reference to Chapter 49, Texas Water Code, is obsolete. Non-profit water supply corporations are currently regulated under Chapter 67, Texas Water Code. The definition of "Financial Assistance" is amended to include a reference to Chapter 15, Subchapter Q, Texas Water Code, which refers to the recently amended Water Infrastructure Fund program. The board is proposing to add a definition for "Legislative Designation" as paragraph (17) of §363.2 to specifically reference the Legislature's authority to designate rivers and streams of unique ecological value as well as sites of unique value for the construction of reservoirs under §16.051(f) and (g), Texas Water Code. Finally, a definition of "Water Plan" has been added to reflect certain statutory amendments made recently to the board's State Participation Program and Water Infrastructure Fund programs to address projects referenced in the current State Water Plan in accordance with §16.051, Texas Water Code.

The proposed amendment to §363.11 (relating to Preapplication Meeting) clarifies the board's position that any preapplication meeting to be held between the board and a potential applicant should be convened prior to the submission of the application for financial assistance. The proposed amendment also clarifies the board's position that preapplication meetings are not mandated for every applicant for financial assistance as there are a number of applicants who have previous experience with the board's financial assistance programs. However, a preapplication meeting may be required by the executive administrator in order to address a project's basic eligibility or to furnish an inexperienced applicant with guidance related to the board's application processing procedures.

The proposed amendments to §363.12 (relating to General, Legal and Fiscal Information) are intended to provide detailed information on the specific information that an application for financial assistance should contain for the following board funding programs: (a) the Water Loan Assistance Fund; (b) the Storage/Acquisition Program; (c) the Colonia Self-Help Program; (d) the Pilot Program for Water and Wastewater Loans to Rural communities; (e) the Water Infrastructure Fund; (f) the State Participation Program, (g) the Water Assistance Bond Program established pursuant to Chapter 17, Subchapter L, Texas Water Code; (h) the Revenue Bond Program; (i) the Groundwater District Loan Program; and (j) the Economically Distressed Areas Program. In order to be considered an administratively complete application, an application for financial assistance must contain general, fiscal, and legal information, as more specifically set out in proposed §363.12(b)(1); a preliminary engineering feasibility report; an environmental assessment; and a water conservation plan. Additional information may also be requested by the executive administrator to assist in the evaluation of the application.

The proposed amendments to §363.13 (relating to Preliminary Engineering Facility Data) replace a general, narrative description of the information that should be provided with the application for financial assistance in the form of preliminary engineering facility data with certain legally prescribed requirements. Specifically, the preliminary engineering facility data should include a description and purpose of the project, the entities to be served, the cost of the project, a description of the alternatives that were considered by the applicant when planning for the project and the reasons for selecting the proposed project, sufficient information to enable the board's staff to evaluate the feasibility of the project, and such additional information as the executive administrator deems necessary in order to evaluate the project.

The proposed amendment to §363.14 (relating to Environmental Assessment) deletes certain language in subsection (b) that references the State Water Pollution Control Revolving Fund Program. All references to this program are being eliminated

in Chapter 363 because the program has been superseded by board rules set forth in 31 TAC Chapters 371 and 375.

The proposed amendments to §363.15 (relating to Required Water Conservation Plan) specify the types of information that must be presented in the water conservation plan portion of the application for financial assistance. Subsection (a) is amended to reference subsection (c) rather than subsection (d) of this rule to ensure consistency in cross-referencing these rule provisions. Subsection (a) is further amended to clarify that the water conservation plan is adequate if it meets the criteria established in subsection (b). The board proposes to delete subsection (b) language relating to the timing of the plan's review by the executive administrator to simplify the review process. The board intends to review the water conservation plan during the application review process to determine whether it meets the criteria established in proposed new subsection (b) that specifies the minimum requirements that must be satisfied by the water conservation plan in order to receive approval from the executive administrator.

Proposed amendment to §363.16(b) deletes economically distressed area projects from the list of projects not eligible for pre-design funding. This change allows the board to commit to funding for planning, acquisition, and design phases of a project before the applicant has completed an environmental determination and conforms with provisions related to financial assistance for facility planning under Chapter 355, Subchapter B. In §363.16(d)(3), the word "loan" is changed to "funds" to indicate that an approvable water conservation plan is required for all applications for pre-design funding. The proposed amendment to subsection (e)(2) of §363.16 deletes the reference to §363.223 (relating to Required Environmental Review and Determinations) because all of the requirements set forth in Chapter 363, Subchapter B, including §363.223, have been deleted; and the requirements contained therein have been superseded by the board's adoption of rules relating to the Drinking Water State Revolving Fund in 31 TAC Chapter 371 and its adoption of rules relating to the Clean Water State Revolving Fund in 31 TAC Chapter 375. The references to §363.223 (relating to Required Environmental Review and Determinations) contained in subsections (f) and (g) also have been deleted to ensure consistency.

The proposed amendment to §363.18 (relating to Promissory Notes and Loan Agreements with Nonprofit Water Supply Corporations) is intended to clarify the board's authority when providing financial assistance to nonprofit water supply corporations. Specifically, the board has amended this rule to emphasize that the board has the authority to require a corporation to engage the services of a bond counsel or a financial advisor when the board will be providing financial assistance either by purchasing bonds issued by the corporation or by purchasing a promissory note and entering into a loan agreement with the corporation.

Proposed new §363.19 (relating to Priority of Projects) is intended to implement certain recent statutory amendments that prioritize funding for projects that are designed to achieve significant water conservation savings. As a preliminary matter, projects only need to be prioritized when there is a limit on the amount of funding that is available. For this reason, proposed §363.19 explicitly provides that the board's rules relating to prioritization of projects only apply when necessitated by a limitation on the availability of funds. In those cases where only limited funding is available, the board must give priority to applications that will implement water supply projects within the state that have been submitted by entities that have already demonstrated significant water conservation savings or that will achieve such savings by implementing the project to be funded.

The proposed amendment to §363.32 (relating to Action of the board on Application) is intended to clarify that the board has the authority to condition the receipt of financial assistance, including the authority to require an applicant to retain professional project management assistance.

The proposed amendments to §363.33 (relating to Interest Rates for Loans and Purchase of Board's Interest in State Participation Projects) include amending subsection (b) to add new paragraph (2) referencing loans from the Water Infrastructure Fund, and deleting subsection (c) which relates to the State Water Pollution Control Revolving Fund. As noted earlier, all references to the State Water Pollution Control Revolving Fund in Chapter 363 are being deleted because these sections have been superseded by the board's rules in 31 TAC Chapter 375 and are no longer necessary.

The proposed amendment to §363.41 (relating to Engineering Design Approvals) revises the number of copies of certain contract documents that must be transmitted to the board for water supply projects requiring Texas Commission on Environmental Quality review. An additional copy of these contract documents is required.

The proposed amendment to §363.42(b) (relating to Loan Closing) revises the date on which the certified bond transcript must be submitted by an applicant for financial assistance. The current rule provides that the certified transcript does not have to be submitted to the board until the final release of funds has occurred. Because the final, certified bond transcript contains the legal requirements and conditions that apply to the project being financed, it is important that this document be forwarded to the board as soon as practicable after the loan has closed. The board is, therefore, proposing to require submission of the certified bond transcript within sixty (60) days of loan closing.

The proposed amendments to §363.43 (relating to Release of Funds) specify the documentation that must be submitted to the board for approval prior to the release of funds for planning, design, and permitting activities. Subsection (a)(2) has been amended to clarify that a statement relating to the sufficiency of funds must only be submitted to the board if additional funds are necessary to complete the project. Subsection (b)(4) has been amended to delete the term "evidence", replacing it with the term "documentation" to indicate that the board must receive written documentation that the requirements and regulations of all identified local, state, and federal agencies have been satisfied, including copies of permits, licenses and other authorizations. A verbal assertion that such requirements have been satisfied without the accompanying documentation will no longer satisfy this requirement. Section 363.43(b) has been amended to include the word "preliminary" in order to provide consistency with §363.13 and other board rules. In order to provide consistency with the proposed changes to §363.13 and §363.43 of the board's rules, subsection (c)(4) has been amended to clarify that a statement relating to the sufficiency of funds must only be submitted to the board if additional funds are necessary to complete the project.

The proposed amendments to §363.55 (relating to Certificate of Approval) provide additional detail on the type of documentation that is needed in order to obtain the Certificate of Approval. The term "notice" has been deleted and replaced with the phrase

"upon receipt of documentation" in order to clarify that the board needs to receive written documentation that the project has been completed in accordance with approved plans and specifications rather than verbal notice. In addition, the political subdivision and project engineer must provide documentation showing that the contractor(s) have received final payment, except for authorized retainage, before a Certificate of Approval will be issued by the executive administrator.

Proposed Repeal of 31 TAC Chapter 363, Subchapter B (relating to State Water Pollution Control revolving Funds).

The board proposes to repeal §§363.201, 363.202, 363.204 - 363.209, 363.221 - 363.226, 363.241, and 363.242 (relating to State Water Pollution Control revolving Fund) because the requirements of these sections have been superseded by the board's adoption of rules in 31 TAC Chapter 375, relating to the Clean Water State Revolving Fund program. The board will reserve Chapter 363, Subchapter B, for future expansion.

Proposed Amendments to 31 TAC Chapter 363, Subchapter E (relating to Economically Distressed Areas).

Proposed amendment to §363.502 deletes the definitions for Tier A, B, and C projects because the classification is no longer applicable under legislation that closed out previous funding and that provides for new EDAP appropriations. Administration of the new EDAP appropriations will be controlled by provisions of the legislation and changes in the board's rules as discussed below.

Proposed amendment to §363.503 adds subparagraph (E) to paragraph (1), adding a determination of a water supply need in the state water plan that the project addresses as a criterion for inadequate water serve in an economically distressed area. The project that addresses the water supply need must be identified as a recommended strategy in the state water plan.

The board proposes amending §363.504(a) to allow application for funding combinations of one or more aspects of a project. For example, a project sequence may include an application for planning, acquisition, and design and a subsequent application for construction, or an application may be for planning only with a subsequent application for acquisition, design, and construction. The proposed amendment also makes clear that applications will be considered by the board on a "first come, first served" basis, rather than according to some priority system.

Proposed amendment to §363.504(a)(2) deletes the requirement for a facility plan based on §355.73, because this requirement created a catch-22 by requiring an environmentally complete facility plan as part of an application to fund a facility plan. The proposed amendment instead gives the board discretion to request any relevant data identified in §355.73. This change identifies what additional information the board may request without the applicant having to incur the expense of a project for which it is seeking funding.

The board proposes amending §363.505(a) to identify additional allocations of funds in the EDAP Account for Water Plan Disadvantaged, Water Plan Rural, and EDAP Rural projects. These allocations are based on legislative directives from the 80th Legislature, Regular Session, and replace the Tier A, B, and C system. References to the former system are deleted from subsections (a) and (b). In addition, the board proposes amending subsection (c) to specifically include contingencies as an eligible expense in the planning phase and to permit a retainage by the board of 15% until the funded activity is substantially complete and authorized by the executive administrator. Under the proposed amendments to subsections (c) and (d), the board may provide financial assistance for which no repayment is required for costs related to the planning, acquisition, or design phases of a project; the construction phase is subject to a grant to loan calculation. The board may extend the term of an agreement for funding under the EDAP at its sole discretion.

The board proposes amending §363.507 by reformatting subsection (a), which mirrors §17.933(d), Texas Water Code, and by adding subsection (c), which allows the board to require reimbursement or impose sanctions for nonperformance under grant agreements.

The board proposes new §363.512, which deals with projects related to the implementation of the state water plan. The new provision sets the maximum amount of grant assistance at 50% for rural political subdivisions that have populations of less than 5,000 and that propose a project addressing a need identified in the state water plan. The proposed rule also requires a nuisance finding before grant assistance for water plan projects can exceed 50%.

Proposed Amendments to 31 TAC Chapter 363, Subchapter J (relating to State Participation Program).

The board proposes to amend §§363.1002, 363.1003, 363.1004, 363.1006, 363.1007, 363.1014, and 363.1017 in Chapter 363, Subchapter J (relating to State Participation Program) to reflect certain statutory changes made by the 80th Legislature, Regular Session, to the board's State Participation program as more fully set out below.

The proposed amendment to §363.1002 (relating to Definitions of Terms) adds a definition for the term "Water Plan Project" to reflect certain recent statutory amendments that expand the State Participation Program to finance projects that are designed to implement the state's current water plan.

The proposed amendment to §363.1003 (relating to Board Participation) revises paragraph (1) by inserting a reference to state water plan projects to reflect certain recent statutory amendments that expand the State Participation Program to finance projects that are designed to implement the state's current water plan.

The proposed amendment to §363.1004 (relating to Application for Assistance) deletes paragraph (10)(F), which requires a list of census blocks within a facility's service area as well as the percent of the current population to be serviced within each census block, and reletters the remaining subparagraphs accordingly. This proposed deletion is designed to eliminate some of the documentation that is currently required with the engineering feasibility report because such detailed data is not needed in order to evaluate the feasibility of the project and can be difficult to compile.

The proposed amendments to subsections (a), (b), and (c) of §363.1006 (relating to Prioritization System) change dates for considering applications and create a prioritization instead of numerical rating criteria. In addition, subsection (c) adds priority to projects that have received legislative designation, such as unique reservoirs.

The proposed amendment to §363.1007 (relating to Prioritization Criteria) eliminates previous numerical rating criteria and replaces them with prioritization criteria. This eliminates the numerical ratings and incorporates recent legislative directives for

water conservation. Procedures will be developed to solicit information for applicants to assess these criteria.

The proposed amendment to §363.1014 (relating to Consideration by the Board) sets the commitment period for these funds at one year. Funds are limited and should be utilized or reallocated to other projects that are ready to proceed.

The proposed amendment to §363.1017(b) (relating to Administrative Cost Recovery for State Participation Program) clarifies that the cost recovery fee is not eligible for financing through the board.

Proposed New 31 TAC Chapter 363, Subchapter L (relating to Water Infrastructure Fund).

The board proposes adding new §§363.1201 - 363.1210 (relating to Water Infrastructure Fund) to implement certain recent statutory amendments to Chapter 15, Subchapter Q, Texas Water Code, relating to the Water Infrastructure Fund, and to consolidate all of the board's rules relating to its various state-based funding programs within Chapter 363.

Proposed §363.1202 (relating to Definitions of Terms) incorporates the definition of eligible applicants from Texas Water Code, Chapter 15, Subchapter Q (Water Infrastructure Fund). The definition of river authorities and special law districts refers to §9.010(b), Texas Water Code, which was repealed in 2003, 78th Legislature, at the same time the Water Infrastructure Fund subchapter was relettered as Subchapter Q. It is interpreted that the provision allowing river authorities and special districts was not intentionally struck but was done so by accident.

Proposed §363.1205 (relating to Interest Rates for Loans) sets interest rates and subsidies for loans from the Water Infrastructure Fund and deletes the original method of rate setting, which did not allow for subsidized rates or payment deferrals.

Proposed §363.1206 (relating to Pre-design Funding Option) sets out the requirements for projects under this Chapter to utilize the pre-design funding option.

Proposed §363.1207 (relating to Prioritization System) incorporates a prioritization system into the Water Infrastructure Fund rules. The system mirrors the prioritization system for state participation projects.

Proposed §363.1208 (relating to Prioritization Criteria) incorporates priority criteria into the Water Infrastructure Fund rules. These criteria are similar to those of state participation.

Proposed §363.1209 (relating to Findings Required) states the findings by the board that are required prior to approval of an application for financial assistance.

Proposed §363.1210 (relating to Action of the Board on Application) sets the commitment period for these funds at one year. Funds are limited and should be utilized or reallocated to other projects that are ready to proceed.

It should be noted that the newly proposed rules relating to the Financial Assistance Programs do not reflect the Design-Build legislation enacted as the result of the passage of HB 1886, Acts of the 80th Legislature, Regular Session (2007). The Texas Water Development Board will consider the impacts of this legislation on its current funding programs in the future and intends to propose new and/or amended rules, if needed, in order to fully and satisfactorily implement this recent legislation.

Melanie Callahan, Chief Financial Officer, has determined that, for the first five-year period the proposal is in effect, there will be no fiscal implications on state government as a result of administration of the proposal. There will be potential fiscal implications for local governments that apply for funding under the State Participation and Water Infrastructure Fund programs, but none as a result of administration of the amended sections of the EDAP. No local government is required to apply for assistance under these programs. If a local government does apply, any additional information requested is not anticipated to have a fiscal impact on the applicant. The fiscal benefit to local governments is the ability to receive savings in financing costs for projects which implement the state water plan. However, at this time, no reliable estimates may be made of the amount of the impact.

Ms. Callahan has also determined that, for the first five years the proposal is in effect, the public benefit anticipated as a result of enforcing the proposal will be more consistency and clarity in rules governing financial assistance programs of the board. Ms. Callahan has determined there will be no economic costs to small businesses or individuals required to comply with the proposal.

Comments on the proposed rules related to the Water Infrastructure Fund will be accepted for 30 days following publication and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by e-mail to rulescomments@twdb.state.tx.us or by fax at (512) 463-5580.

Comments on the proposed rules related to the Economically Distressed Areas Program will be accepted for 30 days following publication and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, or by e-mail to rulescomments@twdb.state.tx.us, or by fax at (512) 463-5580.

SUBCHAPTER A. GENERAL PROVISIONS
DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §363.1, §363.2

Statutory authority: Texas Water Code, §6.101 and §15.605. The amendments are proposed under the authority of the Texas Water Code, §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, and implements Texas Water Code, §15.977 and §16.342, which authorize the board to publish rules to carry out its duties for these programs in particular.

Cross reference to statute: Texas Water Code, Chapter 15, Subchapter Q; Chapter 16, Subchapter C; Chapter 17, Subchapter K; and Chapter 17, Subchapter L.

§363.1. Scope of Subchapter.

This subchapter shall govern the board's programs of financial assistance under the following programs established by the Texas Water Code:

(1) in Chapter 15:

(A) water loan assistance fund under Subchapter C;

~~[(B) state water pollution control revolving fund under Subchapter J;]~~

(B) [~~(C)~~] Storage Acquisition Program authorized under Subchapter E;

(C) [~~(D)~~] Colonia Self-Help Program authorized under Subchapter P; [~~and~~]

(D) [~~(E)~~] Pilot Program for Water and Wastewater Loans to Rural Communities authorized under Subchapter O; and

(E) Water Infrastructure Fund under Subchapter Q;

(2) in Chapter 16, state participation in the purchase or acquisition of facilities under Subchapters E and F;

(3) in Chapter 17:[~~,~~]

(A) the programs of assistance under the Texas water development funds;[~~fund~~] and

(B) the programs of assistance under the water financial assistance bond program (Development Fund II, Subchapter L), including:

(i) financing of water supply projects under Subchapter D;[~~,~~]

(ii) water quality enhancement projects including municipal solid waste facilities under Subchapter F;[~~,~~]

(iii) flood control projects under Subchapter G;[~~,~~] and

(iv) economically distressed areas projects under Subchapter K;

(4) in Chapter 17, Revenue Bond Program under Subchapter I; and

(5) in Chapter 36, Groundwater District Loan Program, under Subchapter L.

§363.2. Definitions of Terms.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words defined in the Texas Water Code, Chapters 15, 16 or 17, and not defined here shall have the meanings provided by the appropriate Texas Water Code chapter.

(1) Applicant--A political subdivision or subdivisions which file an application with the board for financial assistance or associated actions.

(2) Board--Texas Water Development Board.

(3) Building--Erecting, building, acquiring, altering, remodeling, improving, or extending a water supply project, treatment works, or flood control measures.

(4) Closing--The time at which the requirements for loan closing have been completed under §363.42 of this title (relating to Loan Closing) and an exchange of debt for delivery of funds to either the applicant, an escrow agent bank, or a trust agent has occurred.

(5) Commission--Texas Commission on Environmental Quality.

(6) Commitment--An action of the board evidenced by a resolution approving a request for financial assistance from any board financial assistance program under this chapter.

(7) Corporation--A nonprofit water supply corporation created and operating under Texas Water Code, Chapter 67 [~~Chapter 49 (formerly Article 1434a, Vernon's Texas Civil Statutes)~~].

(8) Debt--All bonds, notes, certificates, book-entry obligations, and other obligations authorized to be issued by any political subdivision.

(9) Department--Texas Department of State Health Services.

(10) Escrow--The transfer of funds to a custodian of the funds which will act as the escrow agent or trust agent.

(11) Escrow agent--The third party appointed to hold the funds which are not eligible for release to the loan recipient.

(12) Escrow agent bank--The financial institution which has been appointed to hold the funds which are not eligible for release to the loan recipient.

(13) Executive administrator--The executive administrator of the board or a designated representative.

(14) Financial assistance--Loans, grants, or state acquisition of facilities by the board pursuant to the Texas Water Code, Chapters 15, Subchapters B, C, E, [~~J,~~] O, [~~and~~] P and Q; Chapter 16, Subchapters E and F; Chapter 17, Subchapters D, F, G, I, K, and L; and Chapter 36, Subchapter L.

(15) Grants--Financial assistance provided by the board for which repayment is not required.

(16) Innovative technology--Nonconventional methods of treatment such as rock reed, root zone, ponding, irrigation or other technologies which represent a significant advance in the state of the art.

(17) Legislative Designation--A designation made by the legislature in accordance with §16.051(f) and (g), Texas Water Code.

(18) [~~(17)~~] Municipal use in gallons per capita per day--The total average daily amount of water diverted or pumped for treatment for potable use by a public water supply system. The calculation is made by dividing the water diverted or pumped for treatment for potable use by population served. Indirect reuse volumes shall be credited against total diversion volumes for the purpose of calculating gallons per capita per day for targets and goals developed pursuant to a water conservation plan.

(19) [~~(18)~~] Pre-design commitment--A commitment by the board prior to completion of planning or design pursuant to §363.16 of this title (relating to Pre-design Funding Option).

(20) [~~(19)~~] Release--The time at which funds are made available to the loan or grant recipient or to a state participation recipient pursuant to a master agreement.

(21) [~~(20)~~] Trust agent--The party appointed by the applicant and approved by the executive administrator of the board to hold the funds which are not eligible for release to the loan recipient.

(22) Water Plan--The current state water plan prepared and adopted in accordance with Texas Water Code §16.051.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 5, 2007.

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Joe Reynolds
Attorney
Texas Water Development Board
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For further information, please call: (512) 463-8249

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DIVISION 2. GENERAL APPLICATION PROCEDURES

31 TAC §§363.11 - 363.16, 363.18, 363.19

Statutory authority: Texas Water Code, §6.101 and §15.605. The amendments and new section are proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, and implements Texas Water Code §15.977 and §16.342, which authorize the board to publish rules to carry out its duties for these programs in particular.

Cross reference to statute: Texas Water Code, Chapter 15, Subchapter Q; Chapter 16, Subchapter C; Chapter 17, Subchapter K; and Chapter 17, Subchapter L.

§363.11. Preapplication Meeting.

Prior to [~~An applicant~~] seeking financial assistance, an applicant may be required to [~~should~~] schedule a preapplication conference with the executive administrator to obtain guidance and establish basic eligibility of the project and political subdivision for financial assistance.

§363.12. General, Legal, and Fiscal Information.

An application will be in the form and in numbers prescribed by the executive administrator. The executive administrator may request any additional information needed to evaluate the application, and may return any incomplete applications. The following are required to be considered an administratively complete application:

(1) A political subdivision shall submit an application for financial assistance in writing.

(2) The following information is required on all applications to the board for financial assistance.

(A) General, fiscal and legal information required includes:

(i) the name and address of the political subdivision;

(ii) a citation of the law under which the political subdivision operates and was created;

(iii) the total cost of the project;

(iv) the amount of financial assistance being requested;

(v) a description of the project;

(vi) the name, address, e-mail, and telephone number of the authorized representative, engineer and any other consultant(s);

(vii) the source of repayment and the status of legal authority to pledge selected revenues;

(viii) the financing plan for repaying the total cost of the project;

(ix) the political subdivision's default history;

(x) the most recent annual financial statements and latest monthly and year-to-date financial reports for the General Fund and Utility Fund of the political subdivision;

(xi) a certified copy of a resolution of the political subdivision's governing body requesting financial assistance from the board, authorizing the submission of the application, and designating the authorized representative for executing the application, and for appearing before the board;

(xii) a notarized affidavit from the authorized representative stating that:

(I) for a political subdivision, the decision to request financial assistance from the board was made in a public meeting held in accordance with the Open Meetings Act (Texas Government Code, Chapter 551);

(II) the information submitted in the application is true and correct according to the best knowledge and belief of the representative;

(III) the applicant has no litigation or other proceedings pending or threatened against the applicant that would materially adversely affect the financial condition of the applicant or the ability of the applicant to issue debt;

(IV) the applicant has no pending, threatened, or outstanding judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue of any kind or nature by EPA, the Texas Commission on Environmental Quality, Texas Comptroller, Texas Secretary of State, or any other federal, state or local government, except for such actions identified in the affidavit; and

(V) the applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the board.

(xiii) any special request for repayment structure that reflects the particular needs of the political subdivision.

(B) Preliminary Engineering feasibility report. An applicant shall submit an engineering feasibility report in accordance with §363.13 of this title (relating to Preliminary Engineering Feasibility Data).

(C) Environmental assessment. An applicant shall submit an environmental assessment in accordance with §363.14 of this title (relating to Environmental Assessment).

(D) Required water conservation plan. An applicant shall submit a water conservation plan prepared in accordance with §363.15 of this title (relating to Required Water Conservation Plan).

(E) Additional application information. An applicant shall submit any additional information requested by the executive administrator as necessary to complete the financial, legal, engineering, and environmental reviews.

§363.13. Preliminary Engineering Feasibility Data.

[~~Applicant shall submit an engineering feasibility report signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, shall provide: description and purpose of the project; entities to be served and current and future population; the cost of the project; a description of innovative technology considered and reasons for the selection of the project proposed; sufficient information to evaluate the engineering feasibility; and maps and drawings as necessary to locate and describe the project area. The executive administrator may request additional information or data as necessary to evaluate the project.~~]

(a) An Applicant shall submit copies of a preliminary engineering feasibility report, signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, shall provide:

(1) a description and purpose of the project;

(2) the entities to be served and current and future population;

(3) the cost of the project;

(4) a description of alternatives considered and reasons for the selection of the project proposed;

(5) sufficient information to evaluate the engineering feasibility of the project; and

(6) maps and drawings as necessary to locate and describe the project area.

(b) The executive administrator may request additional information or data as necessary to evaluate the project.

§363.14. Environmental Assessment.

(a) Definitions of Terms. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Environmental regulation--The acts, statutes, or policies listed in subsection (c)(1) of this section and the acts, statutes, or policies identified by the executive administrator pursuant to subsection (c)(2) of this section.

(2) Regulatory agency--The governmental agency with the jurisdiction to review compliance with or to enforce an environmental regulation.

(3) Preliminary project information--The information submitted by an applicant to the executive administrator pursuant to subsection (e) of this section.

(4) Affected environmental regulation--An environmental regulation with which a proposed project potentially may not conform as determined by the executive administrator under this section after reviewing the preliminary project information or the environmental assessment document, if any.

(5) Unaffected environmental regulation--An environmental regulation with which a proposed project will likely conform as determined by the executive administrator under this section after reviewing the preliminary project information or the environmental assessment document, if any.

(b) Applicability and Purpose. This section applies to projects funded by the board under any of the programs identified in §363.1 of this title (relating to Scope of Subchapter) [~~with the exception of the State Water Pollution Control Revolving Fund as noted in §363.1(1)(B)~~]. The purpose of this section is to provide the executive administrator with sufficient information to inform the board whether a proposed project has been adequately reviewed by the regulatory agencies and whether such review provides a reasonable level of certainty that the project will comply with the environmental regulations.

(c) Applicable Environmental Regulations.

(1) Uniform requirements. Prior to commitment of funds, the proposed project shall be coordinated, to the extent appropriate under the three-level review of subsection (f) of this section, with the regulatory agencies to determine the degree of compliance with the following:

(A) Texas Antiquities Code as administered by the Texas Historical Commission;

(B) Federal Endangered Species Act as administered by the United States Fish and Wildlife Service;

(C) resource protection under the Texas Parks and Wildlife Code and Chapter 57 of this title (relating to Fisheries), as administered by the Texas Parks and Wildlife Department; and

(D) Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act as administered by the United States Department of the Army, Corps of Engineers.

(2) Conditional requirements. Proposed projects under certain circumstances may impact other environmental acts, statutes, or policies requiring additional coordination, to the extent appropriate under subsection (f) of this section. The executive administrator may require an applicant to perform such additional coordination for the following environmental regulations:

(A) Migratory Bird Treaty Act as administered by the United States Fish and Wildlife Service;

(B) National Flood Insurance Act of 1968 as administered by the local floodplain protection manager;

(C) state land easements under Texas Natural Resources Code, Chapter 51, as administered by the Texas General Land Office;

(D) parks and recreational lands pursuant to the Texas Parks and Wildlife Code, Chapter 26;

(E) marl, sand, gravel, shell, and mudshell permits under the Texas Parks and Wildlife Code, Chapter 86, and Chapter 57 of this title as administered by the Texas Parks and Wildlife Department; and

(F) any other act, statute, or policies deemed applicable by the executive administrator.

(d) Filing of Assessment or Statement If an agency of the state or federal government prepares or requires an environmental assessment or an environmental impact statement to be prepared for substantially the same project proposed for board financial assistance, then the applicant shall file with the executive administrator the assessment or the statement prepared or required by the state or federal government, and a copy of the state or federal agency's issued decision document or permit in lieu of the information or environmental assessment prepared in accordance with subsections (e) or (f) of this section. Nothing herein shall be construed to require an applicant to prepare an environmental assessment when the information required under this section is currently available in an environmental assessment, environmental impact statement, or other documents prepared in connection with the same project.

(e) Preliminary Project Information. Prior to or concurrently with the submission of an application, the applicant shall submit the information set forth in this section to enable the executive administrator to determine the level of review for the proposed project. Information submitted pursuant to and sufficient to comply with §363.16(d) of this title (relating to Pre-design Funding Option) shall be sufficient to comply with this provision. The applicant shall submit:

(1) a written description of the proposed project;

(2) a map of sufficient detail to accurately depict the location of each project element; and

(3) preliminary data on any known environmental, social, and permitting issues which may affect the alternatives considered for implementation of the project or which may impact the existing environment in a manner that is the subject of any environmental regulation.

(f) Environmental Review. Based on the preliminary project information and any information readily available to the executive administrator, the executive administrator shall require the applicant to comply with the provisions of this subsection for either categorical exclusion review, mid-level review, or full review depending on the complexity of the project and its environmental impacts. Upon submission by the applicant of the information required by this subsection, the executive administrator shall summarize all relevant environmental data and any regulatory agency comments and public comments received

regarding the proposed project in a memorandum. Such memorandum shall include a finding regarding the proposed project's compliance with the environmental regulations and may include a recommendation on any avoidance, minimization, or mitigation measures recommended by a regulatory agency through this review process. Such memorandum shall be submitted to and considered by the board with the application for financial assistance.

(1) Categorical Exclusion. If the executive administrator determines from the preliminary project information that the proposed project would not appear to cause significant environmental impacts under any environmental regulation, the executive administrator shall notify all regulatory agencies of the executive administrator's intent to exclude the proposed project from further environmental review. Unless an objection is received from any regulatory agency within 30 days after such notification is sent by the executive administrator, the executive administrator shall notify the applicant that the proposed project is categorically excluded from further environmental review requirements.

(2) Mid-level Review. If the executive administrator determines from the proposed project information that the proposed project would appear to cause only significant environmental impacts which are limited in number or scope or which may be readily avoided, minimized, or mitigated, the proposed project shall be excluded from further review of unaffected environmental regulations while additional information for adequate review of affected environmental regulations shall be required in accordance with the following procedures.

(A) The executive administrator shall:

(i) notify the regulatory agencies administering the unaffected environmental regulations of the executive administrator's intent to exclude the proposed project from further review of the unaffected environmental regulations. Unless the executive administrator receives objections to the intent to exclude the project from review by such agency within 30 days after such notification is sent, the executive administrator shall deem the proposed project as excluded from further review of such unaffected environmental regulation; and

(ii) promptly notify the applicant of the unaffected environmental regulations which shall be excluded from further environmental review, the affected environmental regulations which shall require further environmental review, and any further information required by statute or the regulatory agencies administering the affected environmental regulations for adequate environmental review.

(B) The applicant shall then choose between one of the two following options and promptly notify the executive administrator of the option selected.

(i) The applicant shall coordinate with the regulatory agencies administering the affected environmental regulations as identified pursuant to subparagraph (A)(ii) of this paragraph, provide to the executive administrator copies of all information submitted by the applicant to such regulatory agencies, provide to the executive administrator copies of all documents received by the applicant from such regulatory agencies regarding the proposed project and, if the executive administrator has determined that it is an affected environmental regulation, documentation establishing compliance with Texas Parks and Wildlife Code, Chapter 26.

(ii) The applicant shall provide to the executive administrator the information required by the regulatory agencies administering the affected environmental regulations for their review and, if the executive administrator has determined that it is an affected environmental regulation, documentation establishing compliance with Texas Parks and Wildlife Code, Chapter 26, whereupon the executive administrator shall coordinate the project review with such regulatory agencies and provide to the applicant copies of all documents received from such regulatory agencies regarding the proposed project.

(3) Full Review. If the executive administrator determines from the proposed project information that the proposed project would appear to cause extensive significant impacts that are not readily avoided, minimized, or mitigated or would appear to involve a probable or known significant public controversy relating to environmental or social impacts, the following procedure shall apply:

(A) the applicant shall prepare an environmental assessment document which shall include all the information required by the regulatory agencies for adequate review by such agencies, a technical description of all the alternatives to the proposed project considered by the applicant, and a discussion of the proposed project's impact on environmental, social, and economic issues compared to such impacts of the alternatives considered;

(B) upon approval by the executive administrator of the environmental assessment document, the executive administrator will provide notification regarding the unaffected environmental regulations in accordance with the procedures under paragraph (2)(A) of this subsection; and

(C) the applicant shall submit the approved environmental assessment document to the regulatory agencies administering the affected environmental regulations for review and comment and provide to the executive administrator copies of all the documents received by the applicant from the regulatory agencies regarding the proposed project and, if the executive administrator has determined that it is an affected environmental regulation, documentation establishing compliance with Texas Parks and Wildlife Code, Chapter 26. Alternatively, the applicant may request that the executive administrator submit the environmental assessment document to such agencies and, upon completion of such coordination, the executive administrator shall provide to the applicant copies of all documents received from such regulatory agencies regarding the proposed project.

(4) Project Change. If the project is changed to include areas or issues that were previously unassessed, then the environmental review process identified in this section shall be employed for such unassessed areas or issues and the executive administrator shall determine the appropriate level of review for such changed project.

(5) Review Change. If, at any time prior to the submission of an application to the board and upon reliable information, the executive administrator determines that the level of review being performed for a proposed project is inappropriate or that the determination that an environmental regulation was an unaffected environmental regulation was incorrect, the executive administrator shall promptly notify the applicant of the required level of review under this section or of the affected environmental regulation for which additional review is required.

§363.15. Required Water Conservation Plan.

(a) An applicant, if not eligible for an exemption under subsection (c) [~~(d)~~] of this section, shall submit [~~either~~] with its application [~~or separately under subsection (b) of this section,~~] two copies of its water conservation plan for approval. The executive administrator shall review all water conservation plans submitted as part of an application for financial assistance for a project, and shall determine if the plans meet the requirements of this section. [~~shall determine if the plans are adequate, and shall present information to the board on the water conservation plan when the application is considered by the board.~~]

[~~(b) An applicant may elect to submit the required water conservation plan after the board approves its application for assistance but~~

before any funds are released. In such case, the applicant shall submit the conservation plan to the executive administrator for review. The executive administrator shall make a preliminary determination as to whether the plan is adequate, and shall submit the plan to the board for consideration. The board will approve, disapprove, or approve with modifications the applicant's water conservation plan during an open meeting. The board may revise the amount and conditions of its financial commitment after considering the water conservation plan.]

(b) [(c)] The water conservation plan required under this section shall include an evaluation of the applicant's water and wastewater system and customer water use characteristics to identify water conservation opportunities and shall set goals to be accomplished by water conservation measures. The water conservation plan shall provide information in response to the following minimum requirements. If the plan does not provide information for each minimum requirement, the applicant shall include in the plan an explanation of why the requirement is not applicable.

(1) Minimum requirements. Water conservation plans shall include the following elements:

(A) a utility profile including, but not limited to, information regarding population and customer data, water use data, water supply system data, and wastewater system data;

(B) [beginning May 1, 2005,] specific, quantified five-year and ten-year targets for water savings to include goals for water loss programs and goals for municipal use, in gallons per capita per day;

(C) a schedule for implementing the plan to achieve the applicant's targets and goals;

(D) a method for tracking the implementation and effectiveness of the plan;

(E) a master meter to measure and account for the amount of water diverted from the source of supply;

(F) a program for universal metering of both customer and public uses of water, for meter testing and repair, and for periodic meter replacement;

(G) measures to determine and control [unaccounted-for uses of] water loss (for example, periodic visual inspections along distribution lines; annual or monthly audit of the water system to determine illegal connections, abandoned services, etc.);

(H) a program of leak detection, repair, and water loss accounting for the water transmission, delivery, and distribution system [in order to control unaccounted-for uses of water];

(I) a program of continuing public education and information regarding water conservation;

(J) a water rate structure which is not "promotional," i.e., a rate structure which is cost-based and which does not encourage the excessive use of water;

(K) a means of implementation and enforcement which shall be evidenced by:

(i) a copy of the ordinance, resolution, or tariff indicating official adoption of the water conservation plan by the applicant; and

(ii) a description of the authority by which the applicant will implement and enforce the conservation plan;

(L) documentation that the regional water planning groups for the service area of the applicant have been notified of the applicant's water conservation plan; and

(M) a current drought contingency plan which includes specific water supply or water demand management measures and, at a minimum, includes, trigger conditions, demand management measures, initiation and termination procedures, a means of implementation, and measures to educate and inform the public regarding the drought contingency plan.

(2) Additional conservation strategies. The water conservation plan may also include other water conservation practice, method, or technique that the applicant deems appropriate.

(c) [(d)] The board may not require an applicant to provide a water conservation plan if the board determines an emergency exists; the amount of financial assistance to be provided is $500,000 or less; implementation of a water conservation program is not reasonably necessary to facilitate water conservation; or the application is for flood control purposes.

(1) An emergency exists when:

(A) a public water system or wastewater system has already failed, or is in a condition which poses an imminent threat of failure, causing the health and safety of the citizens served to be endangered;

(B) sudden, unforeseen demands are placed on a water system or wastewater system (i.e., because of military operations or emergency population relocation);

(C) a disaster has been declared by the governor or president; or

(D) the governor's Division of Emergency Management of the Texas Department of Public Safety has determined that an emergency exists.

(2) The board shall review an application for which an emergency is determined to exist six months after the board commits to financial assistance, and also at the time of any extensions of the loan commitment. If the board finds that the emergency no longer exists, it may then require submission, within six months, of a water conservation plan satisfactory to the board before making any further disbursements on the commitments.

(3) Submission of a new plan is not necessary to facilitate water conservation if the applicant has implemented a water conservation plan that meets the requirements of this section after May 1, 2005 and that plan has been in effect for less than five years.

(d) [(e)] If the applicant will utilize the project financed by the board to furnish water or wastewater services to another entity that in turn will furnish the water or wastewater services to the ultimate consumer, the requirements for the water conservation plan may be met either through contractual agreements between the applicant and that entity providing for establishment of a water conservation plan, which shall be included in the contract at the earliest of the original execution, renewal or substantial amendment of that contract, or by other appropriate measures.

(e) [(f)] The board will accept a water conservation plan determined by the commission to satisfy the requirements of 30 TAC Chapter 288.

§363.16. Pre-Design Funding Option.

(a) This loan application option will provide an eligible applicant that meets all applicable board requirements an alternative to secure a commitment and close a loan for the pre-design, design or build-

ing costs associated with a project. Under this option, a loan may be closed and funds necessary to complete planning and design activities released. If planning requirements have not been satisfied, design and building funds will be held or escrowed and released in the sequence described in this section. After planning and environmental review, the executive administrator may require the applicant to make changes in order to proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient shall use the escrowed funds to redeem bonds purchased by the board in inverse order of maturity.

(b) Flood control, storage acquisition and state participation, reservoir, and municipal solid waste[, ~~and economically distressed area~~] projects are not eligible for funding under this option.

(c) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, social, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(d) Applications for pre-design funding must include the following information:

(1) for loans including building cost, a preliminary engineering feasibility report which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current and future populations and projected flows; alternatives considered; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services;

(3) evidence that an approved water conservation plan will be adopted prior to the release of [~~loan~~] funds;

(4) all information required in §363.12 of this title (relating to General, Legal and Fiscal Information); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(e) After board commitment and completion of all closing and release prerequisites as specified in §363.42 of this title (relating to Loan Closing) and §363.43 of this title (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase;

(2) for design costs, after receipt of executed contracts for the design phase and upon approval of an engineering feasibility report as specified in §363.13 of this title (relating to Engineering Feasibility Data) and compliance with §363.14 of this title (relating to Environmental Assessment) , [~~or §363.223 of this title (relating to Required Environmental Review and Determinations)~~] as applicable; and

(3) for building costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(f) Board staff will use preliminary environmental data provided by the applicant, as specified in subsection (d) of this section and make a written report to the executive administrator on known or potential significant social or environmental concerns. Subsequently, these projects must have a favorable executive administrator's recommendation which is based upon a full environmental review during planning, as provided under §363.14 of this title (relating to Environmental Assessment) , [~~or §363.223 of this title (relating to Required Environmental Review and Determination)~~] as applicable.

(g) The executive administrator will advise the board concerning projects that involve major economic or administrative impacts to the applicant resulting from environmentally related special mitigative or precautionary measures from an environmental assessment under §363.14 of this title (relating to Environmental Assessment), [~~or as conditions in the environmental determination required by §363.223 of this title (relating to Required Environmental Review and Determinations)~~] as applicable.

§363.18. Promissory Notes and Loan Agreements with Non-profit Water Supply Corporations.

(a) The board may provide financial assistance to corporations by either purchasing bonds issued by the corporation or by purchasing a promissory note and entering into a loan agreement with the corporation.

(b) If a corporation executes a promissory note and loan agreement with the board, the corporation may be [~~is not~~] required to engage the services of a bond counsel or a financial advisor.

§363.19. Priority of Projects.

When necessitated by a limitation of funds, the board shall give priority to applications for funds for implementation of water supply projects in the water plan by entities that:

(1) have already demonstrated significant water conservation savings; or

(2) will achieve significant water conservation savings by implementing the proposed project for which the financial assistance is sought.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Joe Reynolds
Attorney
Texas Water Development Board
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DIVISION 3. FORMAL ACTION BY THE BOARD

31 TAC §363.32, §363.33

Statutory authority: Texas Water Code, §6.101 and §15.605. The amendments are proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, and implements Texas Water Code §15.977 and §16.342, which authorize the board to publish rules to carry out its duties for these programs in particular.

Cross reference to statute: Texas Water Code, Chapter 15, Subchapter Q; Chapter 16, Subchapter C; Chapter 17, Subchapter K; and Chapter 17, Subchapter L.

§363.32. Action of the Board on Application.

At the conclusion of the meeting to consider the project, the board may resolve to approve, disapprove, approve with conditions, including requiring the applicant to retain professional project management assistance, or continue consideration of the application. A commitment will include a date after which the financial assistance will no longer be available unless extended by the board. The board may make any changes in the original commitment at the time of extension.

§363.33. Interest Rates for Loans and Purchase of Board's Interest in State Participation Projects.

(a) Procedure and method for setting fixed interest rates.

(1) The executive administrator will set fixed interest rates under this section for purchase of the board's interest in state participation projects or for loans on a date that is five business days prior to the political subdivision's adoption of the ordinance or resolution authorizing its bonds or drawdown of state participation funds and not more than 45 days before the anticipated closing of the loan or state participation project from the board. After 45 days from the establishment of the interest rate of a loan, rates will be reconsidered, and may be extended only with the approval of the executive administrator.

(2) For loans from the Texas Water Development Fund and Texas Water Development Fund II or for lending rates for purchases of the board's interest in state participation projects, the executive administrator will set the interest rate at:

(A) the higher of:

(i) the rates established in the lending rate scale adopted by the board under subsection (b) of this section; or

(ii) either:

(I) for tax-exempt issues, the rates established by the "A" scale of the Delphis Hanover Corporation Range of Yield Curve Scales (Delphis A scale); or

(II) for taxable issues, the Delphis A scale adjusted to take into consideration the difference between taxable and tax-exempt rates in the market, as determined by the executive administrator;

(B) for loans with a maturity less than 15 years, if the interest rates calculated in subparagraph (A) of this paragraph results in a true interest cost that is less than the minimum true interest cost of the lending rate scale established under subsection (b) of this section for those funds, at a rate increased to match the minimum true interest costs so the board may recover all costs attributed to the bonds sold by the board;

(C) for loans funded by the board with proceeds of bonds, the interest of which is intended to be tax exempt for purposes of federal tax law, the executive administrator will limit the interest set pursuant to this subsection at no higher than the rate permitted under federal tax law to maintain the tax exemption for the interest on the board's bond; and

(D) the board may establish different interest rates for loans under this paragraph in order to facilitate a restructuring of an existing board loan that is in imminent risk of default as determined by the board.

(3) Interest rates for loans from the Water Loan Assistance Fund, or from funds from the board's sale of political subdivision bonds to the Texas Water Resources Finance Authority will be set according the Delphis A scale. The board may establish different interest rates for loans under this paragraph if it finds such rates are legislatively directed or are necessary to promote major water initiatives designed to provide significant regional benefit.

(b) Lending rate scale. After each bond sale, or as necessary to meet changing market conditions, the board will set the lending rate scale for loans and state participation projects based upon cost of funds to the board, risk factors of managing the board loan portfolio, and market rate scales. To calculate the cost of funds, the board will add new bond proceeds to those remaining bond funds that are not currently assigned to schedule loan closings, weighting the funds by dollars and true interest costs of each source. The board will establish separate lending rate scales for tax-exempt and taxable projects from each of the following:

(1) loans from the Texas Water Development Fund and Texas Water Development Fund II;

(2) loans from the Water Infrastructure Fund;

(3) [~~(2)~~] purchase of the board's interest in state participation projects from the State Participation Account;

(4) [~~(3)~~] loans from the Economically Distressed Area Program Account; and

(5) [~~(4)~~] if revenue bonds constitute the consideration for the purchase of the board's interest in a state participation project by a political subdivision, the revenue bonds shall bear interest at:

(A) the prevailing state participation lending rate, as set in subsection (b)(3) [~~(b)(2)~~] of this section;

(B) if there is outstanding board indebtedness related to the purchase of its state participation interest, then at the rate then in effect at the time the board provided funds, through the issuance of bonds, to participate in the project; or

(C) a different rate as established by the board, where no schedule for the purchase of the board's interest in the project was fixed at the time the board provided funds to participate in the project.

[~~(c) Interest rates for loans from the State Water Pollution Control Revolving Fund.~~]

[~~(1) Definitions. The following words and terms, when used in this section, shall have the following meanings, unless the context clearly indicates otherwise:~~]

[~~(A) Average life--the number determined by dividing the sum of the payment periods of all maturities of a loan by the total principal amount delivered to the borrower;~~]

[~~(B) Borrower--each eligible applicant receiving a loan from the board;~~]

[~~(C) Delphis--Delphis Hanover Corporation Range of Yield Curve Scales;~~]

[~~(D) Loan interest rate--the individual interest rate for each maturity of a loan as identified by the executive administrator under this chapter;~~]

[~~(E) Market rate--the individual interest rate for each maturity of a loan payment that is the borrower's market cost of funds based on the Delphis index's scale for the borrower as identified under subsection (c)(1) of this section;~~]

[~~(F) Payment period--the number determined by multiplying the total principal amount due for an individual maturity as set forth in the loan by the standard period for the loan; and~~]

[~~(G) Standard period--the number identified by determining the number of days between the date of delivery of the funds to a borrower and the date of the maturity of a bond or loan payment pursuant to which the funds were provided calculated on the basis of~~

a 360-day year composed of twelve 30-day periods and dividing that number by 360.]

[(2) Procedure for setting fixed interest rates.]

[(A) The executive administrator will set fixed rates for loans on a date that is:]

[(i) five business days prior to the adoption of the political subdivision's bond ordinance or resolution or the execution of a loan agreement; and]

[(ii) not more than 45 days before the anticipated closing of the loan from the board.]

[(B) After 45 days from the assignment of the interest rate on the loan, rates may be extended only with the executive administrator's approval.]

[(3) Fixed Rates. The fixed interest rates for Clean Water State Revolving Fund (CWSRF) loans under this chapter will be determined as provided in this subsection. The executive administrator will identify the market rate for the borrower, determine the amount of adjustment from the market interest rate appropriate for the borrower, apply the identified interest rate adjustment to the market rate for the borrower to determine the loan interest rate, and apply the loan interest rate to the proposed principal schedule, as more fully set forth in this subsection.]

[(A) To identify the market rate:]

[(i) for borrowers that will not have bond insurance and with a rating by a recognized bond rating entity, the executive administrator will rely on the higher of the Delphis scale for the current bond rating of the borrower or the Delphis 90 index;]

[(ii) for borrowers with no rating by a recognized bond rating entity or for borrowers with a rating that is less than investment grade as determined by the executive administrator, the executive administrator will rely on the borrower's market cost of funds as related to the Delphis 90 index; or]

[(iii) for borrowers with bond insurance and that are rated by a recognized rating entity or for borrowers with bond insurance and no rating by a recognized bond rating entity, the executive administrator will rely on the higher of the borrower's uninsured fixed rate index scale or the Delphis 96 index scale.]

[(B) The program is designed to provide borrowers with a 70 basis point reduction from the market rate based on a level debt service schedule. For borrowers to which §363.209(c) of this title (relating to Administrative Cost Recovery) must be applied or for borrowers which choose to have §363.209(c) of this title applied, the program is designed to provide borrowers with a 95 basis point reduction from the market rate based on a level debt service schedule. Notwithstanding the foregoing, in no event shall the loan interest rate as determined under this section be less than zero.]

[(C) To determine the loan interest rate, the following procedures will apply:]

[(i) Unless otherwise requested by the borrower under subparagraph (2) hereof, the loan interest rate will be determined based on a debt service schedule that provides interest only will be paid in the first year of the debt service schedule and in which the annual debt service payments are level, as determined by the executive administrator. The executive administrator will identify the appropriate Delphis scale for the borrower and identify the market rate for the maturity due in the year preceding the year in which the average life is reached. The executive administrator will reduce that market rate by the number of basis points applicable according to §363.33(c)(3)(B) and thereby identify a proposed loan interest rate. The proposed loan interest rate will be applied to the proposed principal repayment schedule. If the resulting debt service schedule is level to the satisfaction of the executive administrator, then the proposed loan interest rate will be the loan interest rate for the loan. If the resulting debt service schedule is not level to the satisfaction of the executive administrator, then the executive administrator may adjust the interest rate for any or all of the maturities to identify the loan interest rate that as closely as possible achieves the interest savings applicable according to §363.33(c)(3)(B) while maintaining the principal schedule proposed by the borrower.]

[(ii) A borrower may request a debt service schedule in which the annual debt service payments are not level through the term of the loan, as determined by the executive administrator. In this event, the executive administrator will approximate a level debt service schedule for the loan amount and identify a proposed loan interest rate that provides for annual debt service payments that are level for the term of the loan following the procedures set forth in §363.33(c)(3)(A)(i). From the level debt service schedule, the executive administrator will determine the amount of the subsidy that would have been provided if the annual debt service payments had been level. The executive administrator will then identify the loan interest rate that as closely as possible provides the borrower the identified subsidy amount for the principal schedule requested by the borrower.]

[(4) Variable Rates. The interest rate for CWSRF variable rate loans under this chapter will be set at a rate equal to the actual interest cost paid by the board on its outstanding variable rate debt plus the cost of maintaining the variable rate debt in the CWSRF. Variable rate loans are required to be converted to long-term fixed rate loans within 90 days of project completion unless an extension is approved in writing by the executive administrator. Within the time limits set forward in this subdivision, borrowers may request to convert to a long-term fixed rate at any time, upon notification to the executive administrator and submittal of a resolution requesting such conversion. The fixed lending rate will be calculated under the procedures and requirements of §363.33(c)(2) and §363.33(c)(3).]

[(5) Adjustments. The executive administrator may adjust a borrower's interest rate at any time prior to closing as a result of a change in the borrower's credit rating.]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Joe Reynolds
Attorney
Texas Water Development Board
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DIVISION 4. PREREQUISITES TO RELEASE OF STATE FUNDS

31 TAC §§363.41 - 363.43

Statutory authority: Texas Water Code, §6.101 and §15.605. The amendments are proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the

Texas Water Code and other laws of the State, and implements Texas Water Code §15.977 and §16.342, which authorize the board to publish rules to carry out its duties for these programs in particular.

Cross reference to statute: Texas Water Code, Chapter 15, Subchapter Q; Chapter 16, Subchapter C; Chapter 17, Subchapter K; and Chapter 17, Subchapter L.

§363.41. Engineering Design Approvals.

A political subdivision shall obtain executive administrator approval of contract documents, including engineering plans and specifications, prior to receiving bids and awarding the contract. The political subdivision shall submit three copies of contract documents, which shall be as detailed as would be required for submission to contractors bidding on the work, and which shall be consistent with the engineering feasibility information submitted with the application. An additional copy of the contract documents is required for water supply projects requiring commission review. The contract documents must contain the following:

(1) provisions assuring compliance with the board's rules and all relevant statutes;

(2) provisions providing for the political subdivision to retain a minimum of 5.0% of the progress payments otherwise due to the contractor until the building of the project is substantially complete and a reduction in the retainage is authorized by the executive administrator;

(3) a contractor's act of assurance form to be executed by the contractor which shall warrant compliance by the contractor with all laws of the State of Texas and all rules and published policies of the board; and

(4) any additional conditions that may be requested by the executive administrator.

§363.42. Loan Closing.

(a) Instruments needed for closing. The documents which shall be required at the time of closing shall include the following:

(1) evidence that requirements and regulations of all identified local, state and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations;

(2) certified copy of the ordinances or resolutions adopted by the governing body authorizing issuance of debt sold to the board which has received prior approval by the executive administrator and which shall have sections providing:

(A) that an escrow account, if applicable, shall be created which shall be separate from all other funds and that:

(i) the account shall be maintained at an escrow agent bank or maintained with the trust agent;

(ii) funds shall not be released from the escrow account without written approval by the executive administrator;

(iii) the escrow account bank statements or trust account statement will be provided on a monthly basis to the executive administrator's office; and

(iv) the escrow account will be adequately collateralized as determined by the executive administrator sufficient to protect the board's interest;

(B) that a construction fund shall be created which shall be separate from all other funds of the applicant;

(C) that a final accounting be made to the board of the total sources and authorized use of project funds and that any surplus loan funds be used in a manner as approved by the executive administrator;

(D) that an annual audit of the political subdivision, prepared in accordance with generally accepted auditing standards by a certified public accountant or licensed public accountant be provided annually to the executive administrator;

(E) that the political subdivision shall fix and maintain rates and collect charges to provide adequate operation, maintenance and insurance coverage on the project in an amount sufficient to protect the board's interest;

(F) that the political subdivision will implement any water conservation program required by the board until all financial obligations to the state have been discharged;

(G) that the political subdivision shall maintain current, accurate and complete records and accounts necessary to demonstrate compliance with financial assistance related legal and contractual provisions;

(H) that the political subdivision covenants to abide by the board's rules and relevant statutes, including the Texas Water Code, Chapters 15, 16, and 17; and

(I) that the political subdivision, or an obligated person for whom financial or operating data is presented, will undertake, either individually or in combination with other issuers of the political subdivision's obligations or obligated persons, in a written agreement or contract to comply with requirements for continuing disclosure on an ongoing basis substantially in the manner required by Securities and Exchange Commission (SEC) rule 15c2-12 and determined as if the board were a Participating Underwriter within the meaning of such rule, such continuing disclosure undertaking being for the benefit of the board and the beneficial owner of the political subdivision's obligations, if the board sells or otherwise transfers such obligations, and the beneficial owners of the board's bonds if the political subdivision is an obligated person with respect to such bonds under rule 15c2-12;

(3) two copies of the political subdivision's water conservation program, including documentation of local adoption;

(4) unqualified approving opinions of the attorney general of Texas and if bonds are issued, a certification from the comptroller of public accounts that such debt has been registered in that office;

(5) if bonds are issued, an unqualified approving opinion by a recognized bond attorney acceptable to the executive administrator, or if a promissory note and loan agreement is used, an opinion from the corporation's attorney which is acceptable to the executive administrator;

(6) executed escrow agreement entered into by the entity and an escrow agent bank or an executed trust agreement entered into by the entity and the trust agent satisfactory to the executive administrator, in the event that construction funds are escrowed;

(7) other or additional data and information, if deemed necessary by the executive administrator.

(b) Certified bond transcript. Within 60 days of closing, [~~At such time as available following the final release of funds~~] the political subdivision shall submit a transcript of proceedings relating to the debt purchased by the board which shall contain those instruments normally furnished a purchaser of debt.

(c) Closing requirements for bonds. A political subdivision shall be required to comply with the following closing requirements if the applicant issues bonds that are purchased by the board:

(1) all loans shall be closed in book-entry-only form;

(2) the political subdivision shall use a paying agent/registrar that is a Depository Trust Company (DTC) participant;

(3) the political subdivision shall be responsible for paying all DTC closing fees assessed to the political subdivision by the Board's custodian bank directly to the Board's custodian bank;

(4) the political subdivision shall provide evidence to the Board that one fully registered bond has been sent to the DTC or to the political subdivision's paying agent/registrar prior to closing.

§363.43. Release of Funds.

(a) Release of funds for planning, design and permits. Prior to the release of funds for planning, design, and permits, the political subdivision shall submit for approval to the executive administrator the following documents:

(1) a statement as to sufficiency of funds if additional funds are necessary to complete the activity;

(2) certified copies of each contract under which revenues for repayment of the political subdivision's debt will accrue;

(3) executed consultant contracts relating to services provided for planning, design, and/or permits;

(4) documentation [~~evidence~~] that the requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including but not limited to permits and authorizations; and

(5) other such instruments or documents as the board or executive administrator may require.

(b) Pre-design funding. The funds needed for the total estimated cost of the engineering planning, and design cost if the preliminary engineering feasibility report required under §363.13 of this title (relating to Preliminary Engineering Feasibility Data) [~~or §363.222 of this title (relating to Required SRF Engineering Feasibility Report), as applicable,~~] has been approved, the cost of issuance associated with the loan, and any associated capitalized interest will be released to the loan recipient and the remaining funds will be escrowed to the escrow agent bank or to the trust agent until all applicable requirements in subsections (a) and (c) of this section and §363.16 of this title (relating to Pre-design Funding Option) have been met.

(c) Release of funds for building purposes. Prior to the release of funds for building purposes, the political subdivision shall submit for approval to the executive administrator the following documents:

(1) a tabulation of all bids received and an explanation for any rejected bids or otherwise disqualified bidders;

(2) one executed original copy of each construction contract the effectiveness and validity of which is contingent upon the receipt of board funds;

(3) evidence that the necessary acquisitions of land, leases, easements and rights-of-way have been completed or that the applicant has the legal authority necessary to complete the acquisitions;

(4) a statement as to sufficiency of funds if additional funds are necessary to complete the project;

(5) certified copies of each contract under which revenues to the project will accrue;

(6) documentation [~~evidence~~] that all requirements and regulations of all identified local, state, and federal agencies having jurisdiction have been met, including permits and authorizations; and

(7) other such instruments or documents as the board or executive administrator may require.

(d) Release of funds for projects constructed through one or more construction contracts. For projects constructed through one or more construction contracts, the executive administrator may approve the release of funds for all or a portion of the estimated project cost, provided all requirements of subsection (c) of this section have been met for at least one of the construction contracts.

(e) Escrow of funds. The executive administrator may require the escrow of an amount of project funding related to contracts which have not met the requirements of subsection (c) of this section at the time of loan closing.

(f) Release of funds in installments to water supply corporations. Funds may be released to water supply corporations in installments and pursuant to the provisions of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Joe Reynolds
Attorney
Texas Water Development Board
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DIVISION 5. CONSTRUCTION PHASE

31 TAC §363.55

Statutory authority: Texas Water Code, §6.101 and §15.605. The amendments are proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, and implements Texas Water Code §15.977 and §16.342, which authorize the board to publish rules to carry out its duties for these programs in particular.

Cross reference to statute: Texas Water Code, Chapter 15, Subchapter Q; Chapter 16, Subchapter C; Chapter 17, Subchapter K; and Chapter 17, Subchapter L.

§363.55. Certificate of Approval.

Upon receipt of documentation [~~notice~~] from the political subdivision and project engineer that the project was completed in accordance with approved plans and specifications, and that the contractor has received final payment, except for retainage, the executive administrator shall issue a certificate of completion. This certificate shall be called a certificate of approval.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Joe Reynolds
Attorney
Texas Water Development Board
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SUBCHAPTER B. STATE WATER POLLUTION CONTROL REVOLVING FUND
DIVISION 1. INTRODUCTORY PROVISIONS

31 TAC §§363.201, 363.202, 363.204 - 363.209

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

Statutory authority: Texas Water Code, §6.101. The repeal of these sections are proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties of the board.

Cross reference to statute: Texas Water Code, Chapter 15, Subchapter Q and Chapter 17, Subchapter L. No other statutes or codes are affected by these repeals.

§363.201. Scope of Subchapter.
§363.202. Definitions of Terms.
§363.204. Public Hearings.
§363.205. Project Priority List.
§363.206. Criteria and Methods for Distribution of Funds.
§363.207. Intended Use Plan.
§363.208. Rating Process.
§363.209. Administrative Cost Recovery.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Joe Reynolds
Attorney
Texas Water Development Board
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DIVISION 2. APPLICATIONS FOR ASSISTANCE

31 TAC §§363.221 - 363.226

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

Statutory authority: Texas Water Code, §6.101. The repeal of these sections is proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties of the board.

Cross reference to statute: Texas Water Code, Chapter 15, Subchapter Q and Chapter 17, Subchapter L. No other statutes or codes are affected by this repeal.

§363.221. Optional Preplanning Conferences.
§363.222. Required SRF Engineering Feasibility Report.
§363.223. Required Environmental Review and Determinations.
§363.224. Capital Improvements Plan Option.
§363.225. Applicant Resolution and Financing Agreement.
§363.226. Rural Hardship Grants.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Joe Reynolds
Attorney
Texas Water Development Board
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DIVISION 3. CLOSING AND CONSTRUCTION PHASE

31 TAC §363.241, §363.242

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

Statutory authority: Texas Water Code, §6.101. The repeal of these sections is proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties of the board.

Cross reference to statute: Texas Water Code, Chapter 15, Subchapter Q and Chapter 17, Subchapter L. No other statutes or codes are affected by this repeal.

§363.241. Release of Funds for Building.
§363.242. Progress Payments.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Attorney
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SUBCHAPTER E. ECONOMICALLY DISTRESSED AREAS
DIVISION 1. ECONOMICALLY DISTRESSED AREAS PROGRAM

31 TAC §§363.502 - 363.505, 363.507, 363.512

Statutory authority: Texas Water Code, §6.101 and §15.605. The amendments and new section are proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, and implements Texas Water Code §15.977 and §16.342, which authorize the board to publish rules to carry out its duties for these programs in particular.

Cross reference to statute: Texas Water Code, Chapter 15, Subchapter Q; Chapter 16, Subchapter C; Chapter 17, Subchapter K; and Chapter 17, Subchapter L.

§363.502. Definitions of Terms.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Capital component--That component of the existing rate of a provider utility for the applicable utility service used to retire the long term capital debt of the system determined by calculating a monthly average of the existing annual long term capital debt payments of the utility service provider divided by the total number of living unit equivalents (LUE).

(2) Comparable service provider--A service provider that provides the same type of service as the provider utility for the proposed project to a similarly sized population, with a similar treatment capacity, and serving a population that has a similar per capita income based on available census data adjusted pursuant to the calculation set forth in the §371.24(b)(7) of this title (relating to Disadvantaged Community Program through Loan Subsidies) for adjusted median household income.

(3) Default rate--The average monthly number of residential customers that are delinquent in payment in excess of six months for the service provided divided by the average monthly total number of residential customers.

(4) Economically distressed area--An area in which:

(A) water supply or sewer services are inadequate to meet minimal needs of residential users as defined by board rules;

(B) financial resources are inadequate to provide water supply or sewer services that will satisfy those needs; and

(C) an established residential subdivision was located on June 1, 2005, as determined by the board.

(5) Living unit equivalents or LUE--The number of existing or projected residential rate payer equivalents for the provider utility in the area to be served by a proposed project which is calculated by dividing:

(A) for existing provider utilities, the total historical annual water use of the provider utility, which includes the residential, commercial and institutional water use, by the historical average annual water use of an average residential connection of the provider utility, provided however, that in no event shall the number of LUE's for the project area be less than the number of service connections of the provider utility for the project area; or

(B) for new provider utilities, the total estimated annual water use of the provider utility, which includes the residential, commercial and institutional water use, by the estimated average annual water use of an average residential connection of the provider utility, provided however, that in no event shall the number of LUE's for the project area be less than the estimated number of service connections of the provider utility for the project area.

(6) Long term capital debt--The total amount of outstanding indebtedness of an applicant that at the time the debt was incurred was intended to be repaid over a period longer than one year, the proceeds of such indebtedness being used for the purpose of acquiring, constructing, or improving a water or sewer system or a necessary component to the service, operation, or maintenance of such system, including long term capital leases of real property and provided that leases for personal property are excluded.

(7) Operating entity--(the individuals who compose) the governing body of a provider utility (and the individuals) who are employed by the provider utility to perform the financial, managerial, and technical tasks associated with the operation of the provider utility.

(8) Payment rate--One minus the default rate of a service utility.

(9) Provider utility--The entity which will provide water supply or wastewater service to the economically distressed area.

(10) Regional capital component benchmark--The average capital component of all customers of no less than three comparable service providers.

(11) Regional payment benchmark--The average of the payment rates of no less than three comparable service providers.

~~[(12) Tier A projects--Those projects with unexpired commitments under this subchapter as of the date these rules go into effect and not otherwise identified as either Tier B or Tier C projects.]~~

~~[(13) Tier B projects--Those projects defined pursuant to the grant agreement for assistance program with the United States Environmental Protection Agency and not otherwise identified as either Tier A or Tier C projects.]~~

~~[(14) Tier C projects--Any funds in the Economically Distressed Areas Program Account in excess of the funds available for Tier B projects and not otherwise identified as either Tier B or Tier C projects.]~~

§363.503. Determination of Economically Distressed Area.

To determine that an area is economically distressed, the board shall consider information and data presented with the application or otherwise available to the board to determine that the water or sewer services are inadequate to meet the minimal needs of residential users; that the financial resources of the residential users of the services are inadequate to provide water or sewer services that will satisfy those minimal needs; and that an established residential subdivision was located in the economically distressed area on June 1, 2005.

(1) Water service is inadequate to meet the minimal needs of the residential users of an economically distressed area if the board determines that water service:

(A) does not exist or is not provided;

(B) is provided by a community water system that does not meet drinking water standards established by the commission and set forth in applicable portions of 30 TAC Chapter 290, Subchapter F;

(C) is provided by individual wells, which after treatment, do not meet drinking water standards established by the commission and set forth in applicable portions of 30 TAC Chapter 290, Subchapter F; or

(D) does not meet applicable water quality standards of any other governmental unit with jurisdiction over such area.

(E) The water service is considered inadequate if the project area is identified in the water plan as having a water supply need and the project to address that need is identified as a recommended strategy in the water plan.

(2) Sewer service is inadequate to meet the minimal needs of residential users of an economically distressed area if the board determines that sewer service:

(A) does not exist or is not provided;

(B) is provided by an organized sewage collection and treatment facility that does not comply with the standards and requirements established by the commission and set forth in 30 TAC Chapter 317;

(C) is provided by on-site sewerage facilities that do not comply with the standards and requirements established by the commission and set forth in 30 TAC Chapter 285; or

(D) does not meet applicable wastewater standards of any other governmental unit with jurisdiction over such area.

(3) The financial resources of the residential users of the economically distressed area are inadequate to provide the needed services if the board finds that the area to be served by a proposed project has a median household income that is not greater than 75% [~~percent~~] of the median state household income for the most recent year for which statistics are available.

(4) An established residential subdivision was located in the economically distressed area on June 1, 2005, if the board determines the following:

(A) either a plat of the area is recorded in the county plat or deed records; or a pattern of subdivision, without a recorded plat, is evidenced by existence of multiple residential lots derived from a common tract with roads, streets, utility easements, or other such incidents of common usage or origin;

(B) at least one occupied residential dwelling existed within the platted or subdivided area on June 1, 2005, and

(C) such other factors as may be determined relevant by the board.

(5) The boundary or limits of a water or sewage project to serve an economically distressed area may be determined by:

(A) a subdivision plat prepared by a registered engineer, whether recorded or not;

(B) a metes and bounds description, natural boundaries, roads, or other natural features that delineate an unplatted area within which a feasible cost-effective project can be developed; or

(C) inclusion of occupied dwellings with inadequate water or wastewater services in close proximity to an economically distressed area delineated as provided above in a project area when such dwellings can be feasibly served by a proposed project within which a feasible cost-effective project can be developed.

§363.504. Required Application Information.

(a) An application for planning, acquisition, [~~and~~] design , construction, or a combination thereof, [~~funding~~] shall be in the form and numbers prescribed by §363.12 of this title (relating to General, Legal, and Fiscal Information). [~~the executive administrator and, in~~] Applications will be considered by the board on the basis and in the order that an administratively complete application, as determined by the executive administrator, is filed with the board. In addition to any other information that may be required by the executive administrator or the board, the applicant shall provide:

(1) information to establish to the satisfaction of the executive administrator that the county in which the applicant is located has adopted and is enforcing the model rules adopted by the board pursuant to Texas Water Code §16.343 (model rules) and that, if any part of the project is located within the corporate limits of a municipality or its extraterritorial jurisdiction, the municipality has adopted and enforcing the model rules, including the following information:

(A) A copy of the subdivision regulations adopted by the county and the municipality, if applicable;

(B) From the county and the municipality, if applicable, the lesser of either the three most recently approved residential subdivision plats or all recently approved subdivision plats that are within the jurisdiction of the county, and municipality if applicable; provided however that if a county or municipality has not approved any residential subdivision plats within the last five years, then the county judge and mayor, if applicable, shall submit a notarized statement to such effect;

(C) A notarized statement from the county judge that:

(i) the residential subdivision regulations adopted by the county and submitted with the statement fully incorporate the model rules;

(ii) any residential subdivision plats submitted with this statement fully comply with the county regulations;

(iii) acknowledges if the executive administrator determines that the county is not enforcing the model rules, that all funds provided by the board under this subchapter and committed for projects in the county shall be suspended; and

(iv) such statement shall be considered sufficient to establish compliance with the model rules for five years unless the executive administrator identifies significant violations with the model rules and the county is unable to correct the deficiencies within 90 days of notification of the violations;

(D) If any part of the project is located within the corporate limits of a municipality or its extraterritorial jurisdiction, a notarized statement from the mayor that:

(i) the residential subdivision regulations adopted by the municipality and submitted with the statement fully incorporate the model rules;

(ii) any residential subdivision plats submitted with this statement fully comply with the municipality's regulations;

(iii) acknowledges if the executive administrator determines that the municipality is not enforcing the model rules, that all funds provided by the board under this subchapter and committed for projects in the municipality or its extraterritorial jurisdiction shall be suspended; and

(iv) such statement shall be considered sufficient to establish compliance with the model rules for five years unless the executive administrator identifies significant violations with the model rules and the municipality is unable to correct the deficiencies within 90 days of notification of the violations;

(E) If the county or municipality, if applicable, have only been required or authorized to adopt residential subdivision rules that enforce the model rules within one year of the submission of the application, the executive administrator may require that each member of the applicable governing body:

(i) complete a course of training of not more than two hours on the implementation of the model rules prepared and pro-

vided by the executive administrator in a widely available medium at no cost; and

(ii) provide a notarized statement that the member has completed the training.

(2) Any[~~a facility plan satisfactory in form and in substance to the executive administrator that includes all of the facility engineering data, studies, and analysis described in §355.73(a) of this title (relating to Scope of Facility Plan), and any~~] relevant data or information identified in §355.73(b) of this title [~~as~~] may be requested by the board or the executive administrator.

(3) a proposed project schedule and budget that includes estimated project costs and identifying the source of funds;

(4) a resolution from its governing body which shall:

(A) request financial assistance and identify the amount of requested assistance;

(B) designate the authorized representative to act on behalf of the governing body; and

(C) authorize the representative to submit the application, appear before the board on behalf of the applicant, and submit such other documentation as may be required by the executive administrator or the board;

(5) a notarized affidavit from the authorized representative stating that:

(A) the decision to request financial assistance from the board was made in a public meeting held in accordance with the Open Meetings Act (Texas Government Code, §§551.001, et seq.,) and after providing all such notice as required by such Act as is applicable to the applicant or, for a corporation, that the decision to request financial assistance from the board was made in a meeting open to all customers and after providing all customers written notice at least 72 hours prior to such meeting that a decision to request public assistance would be made during such meeting;

(B) the information submitted in the application is true and correct according to best knowledge and belief of the representative;

(C) the applicant has no outstanding judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue of any kind or nature by EPA, the commission, Texas Comptroller, Texas Secretary of State, or any other federal, state or local government or identifying such judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue as may be outstanding for the applicant;

(D) the applicant warrants compliance with the representations made in the application in the event that the board provides the financial assistance; and

(E) the applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the board;

(6) copies of any proposed or existing contracts with any appropriate consultants such as financial advisory, engineering, general counsel and bond counsel services to be used by the applicant in applying for financial assistance or constructing the proposed project. Contracts for engineering services should include the scope of services, level of effort, costs, schedules, and other information necessary for adequate review by the executive administrator;

(7) a citation to the specific legal authority in the Texas Constitution and statutes pursuant to which the applicant is authorized to provide the service for which the applicant is receiving financial assistance as well as the legal documentation identifying and establishing the legal existence of the applicant as may be deemed necessary by the executive administrator;

(8) if the applicant provides or will provide water supply or treatment or sewer service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing; and

(9) documentation of the ownership interest, with supporting legal documentation, of property on which proposed project shall be located, or if the property is to be acquired, certification that the applicant has the necessary legal power and authority to acquire the property.

(b) Pursuant to Texas Local Government Code §232.071, the authority of a county to adopt and enforce the model rules may be subject to a political subdivision within such county submitting an application for financial assistance under Texas Water Code, Chapter 17,[~~.~~] Subchapter K. If an economically distressed area is located within such a county, the following rules apply.

(1) If the board has funds available to provide the financial assistance to political subdivisions under Texas Water Code, Chapter 17. Subchapter K, the applicant shall submit:

(A) all information required by subsection (a) of this section except for the information required pursuant to subsection (a)(1) of this section;

(B) upon the determination by the executive administrator that the information provided complies with the requirements of subsection (a)(2) of this section, the board shall consider the information submitted by the applicant;

(C) if the board determines that there is an economically distressed area identified in the county, the board will issue a written resolution finding that such an area exists in the county; and

(D) the applicant must submit the information required by subsection (a)(1) of this section within 90 days of the determination by the board.

(2) If the board does not have funds available to provide financial assistance to political subdivisions under Texas Water Code, Chapter 17, Subchapter K, a political subdivision may submit:

(A) all information required by subsection (a)(2) of this section;

(B) upon the determination by the executive administrator that the information provided complies with the requirements of subsection (a)(7) of this section, the board shall consider the information submitted by the political subdivision; and

(C) if the board determines that there is an economically distressed area identified in the county, the board will issue a written resolution finding that such an area exists in the county.

§363.505. Application Review and Assistance Conditions.

(a) The funds available for projects eligible for financial assistance from the Economically Distressed Areas Program Account under this subchapter shall be determined by the board and are additionally allocated as follows:

(1) to political subdivisions that have median household incomes that are not greater than 75% of the state median household income for the most recent year for which statistics are available and that

serve areas outside metropolitan statistical areas and have populations of less than 5,000 for projects that implement the water plan; and

(2) to political subdivisions that have median household incomes that are not greater than 75% of the state median household income for the most recent year for which statistics are available for projects that implement the water plan; and

(3) to political subdivisions that have median household incomes that are not greater than 75% of the state median household income for the most recent year for which statistics are available and that serve areas outside metropolitan statistical areas and have populations of less than 5,000.

~~[(1) up to $15 million for projects that have unexpired commitments under this subchapter, referred to herein as Tier A projects;]~~

~~[(2) up to $50 million for projects that are eligible for assistance pursuant to the Colonia Wastewater Treatment Assistance Program, as defined pursuant to the grant agreement for that assistance program with the United States Environmental Protection Agency, referred to herein as Tier B projects;]~~

~~[(3) any funds in the Economically Distressed Areas Program Account in excess of the funds available for Tier A projects in paragraph (1) of this subsection shall be combined with Tier B projects in paragraph (2) of this subsection; and]~~

~~[(4) any funds in the Economically Distressed Areas Program Account in excess of the funds available for Tier B projects in paragraph (2) of this subsection shall be combined with this fund for all projects eligible for assistance under this subchapter, herein referred to as Tier C projects.]~~

(b) An application for construction funding shall include all the requirements in §363.504(a) of this title (relating to Required Application Information)[~~subsection (a) above~~] as well as a facility plan [~~satisfactory in form and in substance to the executive administrator~~] that includes all of the facility engineering data, studies, and analysis [~~described in §355.73(a) of this title (relating to Scope of Facility Plan),~~] and any other relevant data or information [~~identified in §355.73(b)~~] as may be requested by the board or the executive administrator. [~~To receive financial assistance as a Tier A project an application must be filed no later than the 90th calendar day following the effective date of these rules. An application to receive financial assistance as a Tier B project must be filed no later than the 180th calendar day following the effective date of these rules. An application for all other projects will be considered by the board on the basis in the order that an administratively complete application, as determined by the executive administrator, is filed with the board.~~]

(c) The board may provide financial assistance from the Economically Distressed Areas Program Account for the following construction activities as defined in Texas Water Code §17.001(8):

(1) The board may provide financial assistance for which no repayment is required for costs necessary to provide water or sewer services to economically distressed areas for the following activities:

(A) preliminary planning, including contingencies as determined by the board, to determine the feasibility of a water supply project, treatment works, or flood control measures;

(B) engineering, architectural, legal, title, fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, or other necessary actions; and

(C) the expense of any acquisition, condemnation or other legal proceedings associated with real property acquisitions.

(D) The grant agreement may contain provisions for the board to retain a minimum of 15% of the progress payments otherwise due to the applicant until the funded deliverable, as defined in the grant agreement, is substantially complete and is authorized by the executive administrator;

(2) Upon[~~upon~~] approval by the executive administrator of the completion of activities identified in paragraph (1) of this subsection, the board may provide financial assistance in the amount and manner provided in §363.506[~~§363.503~~] of this title (relating to Calculation of Financial Assistance[~~Determination of Economically Distressed Area~~]) for costs necessary to provide water or sewer services to economically distressed areas for the following activities:

(A) construction including erecting, building, acquiring, altering, remodeling, improving, acquiring or extending a water supply project or water services, treatment works or sewer services or facilities; and

(B) the inspection or supervision of any of the items listed herein.

(d) The board shall set the terms of the financial assistance provided under subsection (c) of this section, and such terms may be extended at the sole discretion of the board. [~~Applicants receiving funds committed under subsection (c)(2) of this section shall commence the construction activities for which funds have been provided no later than one year from the date of the commitment made by the board; provided however, the board, in its sole discretion, may approve a single three-month extension. No unexpended funds that have been committed under subsection (c)(2) of this section shall be provided to an applicant two years from the date of commitment; provided however, the board, in its sole discretion, may approve a single six-month extension.~~]

§363.507. Terms of Financial Assistance.

(a)The board shall determine the amount and form of financial assistance and the amount and form of repayment. The board shall consider:

(1) rates, fees, and charges that the average customer to be served by the project will be able to pay based on a comparison of what other families of similar income who are similarly situated pay for comparable services;[~~,~~]

(2) sources of funding available to the political subdivision from federal and private funds and from other state funds;[~~, and~~]

(3) any local funds available from [~~of~~] the political subdivision [~~to be served by the project~~] if the economically distressed area to be served by the board's financial assistance is within the boundary of the political subdivision; and

(4) the just, fair, and reasonable charges for water and wastewater service as provided in the Texas Water Code.

(b) The board shall determine the method of evidence of debt.

(c) If the board determines non-performance on the terms of the grant, the board may require reimbursement of all or part of the funds provided by grant assistance or impose sanctions such as prohibition of further board financial assistance.

§363.512. Projects Related to Implementation of the Water Plan.

(a) Financial assistance may be provided to a political subdivision which serves areas outside metropolitan statistical areas and has a population of less than 5,000 for a project that implements the water plan. The amount of assistance for which the board does not expect repayment shall be 50% of the total assistance provided.

(b) Financial assistance may be provided to a political subdivision which has a median household income that is not greater than 75% of the state median household income for the most recent year for which statistics are available for a project that implements the water plan. The amount of assistance for which the board does not expect repayment shall be 50% of the total assistance provided. The board may provide financial assistance for which no repayment is required if the applicant provides a finding from the Texas Department of State Health Services that a nuisance dangerous to the public health and safety exists resulting from water supply in the area to be served by the proposed project.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 5, 2007.

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Joe Reynolds
Attorney
Texas Water Development Board
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For further information, please call: (512) 463-8249

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SUBCHAPTER J. STATE PARTICIPATION PROGRAM

31 TAC §§363.1002 - 363.1004, 363.1006, 363.1007, 363.1014, 363.1017

Statutory authority: Texas Water Code, §6.101 and §15.605. The amendments are proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, and implements Texas Water Code §15.977 and §16.342, which authorize the board to publish rules to carry out its duties for these programs in particular.

Cross reference to statute: Texas Water Code, Chapter 15, Subchapter Q; Chapter 16, Subchapter C; Chapter 17, Subchapter K; and Chapter 17, Subchapter L.

§363.1002. Definitions of Terms.

The following word and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Excess capacity--The difference between the foreseeable needs of the area to be served by the useful life of the facility and the existing needs for the area to be served by the facility.

(2) Facility--A regional facility for which an application has been submitted requesting financial assistance from the state participation account and that includes sufficient capacity to serve the existing needs of the applicant and excess capacity.

(3) Alternate facility--A construction project that would be necessary to serve the excess capacity of the area to be served by the facility in the event that the facility was not initially constructed to meet the excess capacity.

(4) Existing needs--Maximum capacity necessary for service to the area receiving service from the facility for current population and including the service necessary to serve the estimated population in the area ten years from the date of the application.

(5) New water supply project--A project which will create new, usable water supply through the construction of a reservoir, dam, stormwater retention basin, or the development of conservation or innovative technologies including, but not limited to, desalinization, demineralization, other advanced water treatment practices, floodwater harvesting, or aquifer storage and recovery.

(6) Water plan project--A project which is identified as a recommended strategy in the water plan.

§363.1003. Board Participation.

Unless otherwise directed by legislation, the board will only use the State Participation Accounts of the Texas Water Development Fund I or the Texas Water Development Fund II to provide financial assistance for all or a part of the cost to construct the excess capacity of:

(1) an eligible new water supply or water plan project where:

(A) at least 20% of the total facility capacity of the proposed project will serve existing need, or

(B) the applicant will finance at least 20% of the total project cost from sources other than the State Participation Account; and

(2) all other projects eligible for state participation where:

(A) at least 50% of the total facility capacity of the proposed project will serve existing need, or

(B) the applicant will finance at least 50% of the total project cost from sources other than the State Participation Account.

§363.1004. Application for Assistance.

In addition to any other information that may be required by the executive administrator or the board, the applicant shall provide:

(1) a resolution from its governing body which shall:

(A) request financial assistance and identify the amount of requested assistance;

(B) designate the authorized representative to act on behalf of the governing body; and

(C) authorize the representative to execute the application, appear before the board on behalf of the applicant, and submit such other documentation as may be required by the executive administrator or the board;

(2) a notarized affidavit from the authorized representative stating that:

(A) the decision to request financial assistance from the board was made in a public meeting held in accordance with the Open Meetings Act (Texas Government Code, §551.001, et seq,) and after providing all such notice as required by such Act;

(B) the information submitted in the application is true and correct according to best knowledge and belief of the representative;

(C) the applicant has no outstanding judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue of any kind or nature by EPA, Texas Commission on Environmental Quality (commission), Texas Comptroller, Texas Secretary of State, or any other federal, state or local government or identifying such judgments, orders, fines, penalties, taxes, assessment or other enforcement or compliance issue as may be outstanding for the applicant;

(D) the applicant warrants compliance with the representations made in the application in the event that the board provides the financial assistance; and

(E) the applicant will comply with all applicable federal laws, rules, and regulations as well as the laws of this state and the rules and regulations of the board;

(3) a proposed schedule for purchase of the board's interest in the project;

(4) copies of any proposed or existing contracts for consultant financial advisory, engineering, and bond counsel services to be used by the applicant in applying for financial assistance or constructing the proposed project. Contracts for engineering services should include the scope of services, level of effort, costs, schedules, and other information necessary for adequate review by the executive administrator;

(5) a citation to the specific legal authority in the Texas Constitution and statutes pursuant to which the applicant is authorized to provide the service for which the applicant is receiving financial assistance as well as the legal documentation identifying and establishing the legal existence of the applicant as may be deemed necessary by the executive administrator;

(6) if the applicant provides or will provide water supply or treatment service to another service provider, or receives such service from another service provider, the proposed agreement, contract, or other documentation which legally establishes such service relationship, with the final and binding agreements provided prior to closing;

(7) documentation of the ownership interest, with supporting legal documentation, of property on which proposed project shall be located, or if the property is to be acquired, certification that the applicant has the necessary legal power and authority to acquire the property;

(8) if payment under the master agreement is based either wholly or in part from revenues of contracts with others, a copy of any actual or proposed contracts under which applicant's gross income is expected to accrue. Prior to release of funds, an applicant shall submit executed copies of such contracts to the executive administrator;

(9) if an election is required by law to authorize participation in the project, the executive administrator may require applicant to provide the election date and election results as to each proposition necessary for the participation of the applicant as part of the application.

(10) Applicant shall submit an engineering feasibility report signed and sealed by a professional engineer registered in the State of Texas. The report, based on guidelines provided by the executive administrator, shall provide:

(A) description and purpose of the project;

(B) entities to be served and current and future population;

(C) the cost of the project;

(D) a description of the alternatives considered and reasons for selection of the project proposed;

(E) sufficient information to evaluate the engineering feasibility;

[~~(F) a list of the census blocks within the facility service area and the percent of current population to be served residing within each census block;~~]

(F) [~~(G)~~] copy of the board or commission approved water conservation plan, if any, or a copy of a proposed water conservation plan prepared in accordance with §363.15 of this title (relating to Required Water Conservation Plan); and

(G) [~~(H)~~] maps and drawings as necessary to locate and describe the project service area. The executive administrator may request additional information or data as necessary to evaluate the project.

§363.1006. Prioritization [~~Priority Rating~~] System.

(a) The executive administrator will prioritize [~~rate~~] all applications not previously considered by the board on February [~~March~~] 1 and September [~~October~~] 1 of each year. An application must be submitted by January [~~February~~] 1 to be prioritized [~~rated~~] on February [~~March~~] 1. An application must be submitted by August [~~September~~] 1 to be prioritized [~~rated~~] on September [~~October~~] 1. The executive administrator will provide the prioritization [~~ratings~~] to the board in February [~~March~~] and September [~~October~~] of each year. [~~The board may consider rated applications at its March or October board meetings or may postpone consideration of any rated applications at its discretion.~~]

(b) Prior to each board meeting at which applications may be considered, the executive administrator shall:

(1) for each application that the executive administrator has determined is complete, prioritize [~~identify the number of points that~~] the applications using the [~~application is entitled to receive from the rating~~] criteria identified in §363.1007 of this title (relating to Prioritization [~~Rating~~] Criteria).

(2) provide to the board a list of all completed applications, the amount of funds requested and the priority of [~~total number of points that~~] each application received; and

(3) identify to the board, the total amount of funds available in the State Participation Account for new applications.

(c) If there are funds in the State Participation Account to fund all or part of any of the projects for which the executive administrator has received completed applications during the preceding six months, the board will first consider any projects that the legislature has determined shall receive priority for financial assistance from the State Participation Account or that have received legislative designation. If, after considering projects with legislative priority or legislative designation, there are funds available for other eligible projects in the State Participation Account, then the board will consider such other applications received by the executive administrator during the preceding six month period in descending numerical order based on the priority [~~rating points~~] assigned to the application according to §363.1007 of this title. The board will consider the next application on the list only if there are funds available in the account to fund all or, if acceptable to the applicant, a part of the application.

(d) The board shall determine the amount of funds available for water plan projects and shall prioritize and consider those separately from projects that are not water plan projects.

§363.1007. Prioritization [~~Rating~~] Criteria.

[~~(a)~~] The factors to be used by the executive administrator to prioritize [~~rate~~] projects seeking financial assistance from the State Participation Account[~~, and the points assigned to each factor,~~] shall be as follows:

(1) water development projects will receive priority over [~~2 points, and~~] wastewater projects [~~will receive 1 point~~];

(2) priority will be given to projects which result in the development of a new, usable supply of water [~~through conservation or~~

innovative technologies including, but not limited to, desalinization, demineralization, other advanced water treatment practices, wastewater reuse, floodwater harvesting, or aquifer storage and recovery will receive 2 points];

(3) priority will be given to projects which have received previous board funding for facility planning, design, or permitting for the project [being rated will receive 1 point];

(4) priority will be given to entities that:

(A) have already demonstrated significant water conservation savings; or

(B) will achieve significant water conservation savings by implementing the proposed project for which the financial assistance is sought.

(5) priority will be given to projects which have the earliest identifiable need, as outlined in the water plan.

[(4) water conservation programs required under §363.1004(10)(G) of this title (relating to Application for Assistance) will be granted a maximum of 4 points for each applicant based upon the following.]

[(A) Applicants which have previously adopted a board approved water conservation program or who have previously submitted a water conservation program to the commission that has been deemed complete by the commission will receive 2 points.]

[(B) Applicants will receive 0.25 points for each of the following elements that are found in the submitted water conservation program totalling to a maximum sum of 2 rating points per applicant:]

[(i) codes and ordinances which require the use of water-conserving technologies;]

[(ii) ordinances to promote efficiency and avoid waste;]

[(iii) commercial and residential conservation audits for indoor and landscape water uses;]

[(iv) plumbing fixture replacement and retrofit programs;]

[(v) recycling and reuse of reclaimed wastewater and/or gray water;]

[(vi) demonstrated submittals of accepted annual water conservation reports to the board and/or the commission;]

[(vii) demonstrated historical unexplained water loss of no more than 15%;]

[(viii) provision to update the program in intervals no longer than once every five years.]

[(5) Applicants which propose to use local funds for a portion of the project will receive the number equal to the percentage of local ownership, expressed as a decimal.]

[(6) Applicants will receive a number equal to the percentage, expressed as a decimal, of the total facility capacity that would be necessary to serve the existing population that could use the facility at the time the application is filed.]

[(7) New water supply projects will receive 2 points.]

[(b) Between tie scores only, 1 point will be awarded to the project having the service area which has the lowest median annual household income, based upon the most current data available from the U.S. Bureau of the Census, for all of the areas to be served by the project.]

§363.1014. Consideration by Board.

The application shall be scheduled on the board's agenda, and representatives of the prospective purchaser and other interested parties shall be notified of the time of the meeting. At the conclusion of the meeting to consider the project, the board may resolve to approve, disapprove, approve with conditions, or continue consideration of the application. A commitment will include a date after which the financial assistance will no longer be available. That date shall be the end of that month which is twelve months from the month of board commitment.

§363.1017. Administrative Cost Recovery for State Participation Program.

(a) General. The board will assess fees for the purpose of recovering administrative costs from all political subdivisions with which the board agrees to participate in a state participation project under this subchapter in an amount of 0.77% of the amount of the total participation in the project by the board.

(b) Payment Method. Payment of one-third of the fee is due at closing. The balance of the fee may be paid in a limited number of annual installments with the consent of the executive administrator. The fee may not be included in the total amount of financial assistance provided by the board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Joe Reynolds
Attorney
Texas Water Development Board
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SUBCHAPTER L. WATER INFRASTRUCTURE FUND

31 TAC §§363.1201 - 363.1210

Statutory authority: Texas Water Code, §6.101 and §15.605. The new sections are proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, and implements Texas Water Code §15.977 and §16.342, which authorize the board to publish rules to carry out its duties for these programs in particular.

Cross reference to statute: Texas Water Code, Chapter 15, Subchapter Q; Chapter 16, Subchapter C; Chapter 17, Subchapter K; and Chapter 17, Subchapter L.

§363.1201. Scope of Subchapter L.

This subchapter shall govern applications for financial assistance from the Water Infrastructure Fund, established by the Texas Water Code, Chapter 15, Subchapter Q. The program described in this subchapter shall be known as the Water Infrastructure Fund. Unless in conflict with the provisions of this chapter, the provisions of Subchapter A of

this chapter (relating to the General Provisions of Financial Assistance Programs) shall apply to applications for assistance from the Water Infrastructure Fund.

§363.1202. Definitions of Terms.

Words and terms used in this subchapter shall have the following meanings, unless the context clearly indicates otherwise. Words defined in Texas Water Code, Chapter 15 and not defined here shall have the meanings provided by the appropriate Texas Water Code chapter.

(1) Eligible political subdivision--

(A) a municipality;

(B) a county;

(C) a river authority or special law district including, but not necessarily limited to, North East Texas Municipal Water District, Angelina and Neches River Authority, Lower Neches Valley Authority, Sabine River Authority, Upper Neches River Municipal Water Authority, Red River Authority of Texas, Sulphur River Municipal Water District, Sulphur River Basin Authority, San Jacinto River Authority, Gulf Coast Water Authority, North Harris County Regional Water Authority, North Texas Municipal Water District, Tarrant Regional Water District, Trinity River Authority, Dallas County Utility and Reclamation District, Brazos River Authority, West Central Texas Municipal Water District, North Central Texas Municipal Water Authority, Guadalupe-Blanco River Authority, Lavaca-Navidad River Authority, Lower Colorado River Authority, Upper Guadalupe River Authority, Nueces River Authority, San Antonio River Authority, Bexar-Medina-Atascosa Counties Water Control and Improvement District No. 1, Colorado River Municipal Water District, Central Colorado River Authority, Upper Colorado River Authority, Canadian River Municipal Water Authority, and Mackenzie Municipal Water Authority;

(D) a water improvement district;

(E) an irrigation district;

(F) a water control and improvement district; and

(G) a groundwater district with a groundwater management plan certified by the board under Texas Water Code §36.1072.

(2) Fund--The Water Infrastructure Fund.

(3) Project--Any undertaking or work, including planning and design activities and work to obtain regulatory authority, to conserve, mitigate, convey, and develop water resources of the state, including any undertaking or work done outside the state that the board determines will result in water being available for use in or for the benefit of the state.

§363.1203. Use of Funds.

(a) The board may use the fund for financial assistance as follows:

(1) to make loans to political subdivisions at or below market interest rates for projects; and

(2) to make loans to political subdivisions at or below market interest rates for planning and design costs, permitting costs, and other costs associated with state or federal regulatory activities with respect to a project.

(b) The board may make funding available under subsection (a) of this section only for implementation of projects which are:

(1) recommended water management strategies in a board-approved regional water plan adopted pursuant to Texas Water Code §16.053 or in the water plan adopted pursuant to Texas Water Code §16.051; or

(2) designed to develop existing sources of water consistent with sources and supplies listed in the board-approved regional water plan adopted pursuant to Texas Water Code §16.053 or in the water plan adopted pursuant to Texas Water Code §16.051, provided that the fund may not be used to maintain a system or to develop a retail distribution system.

§363.1204. Availability of Funds.

For each fiscal year, the board will determine the amount of funds to be available from all sources to the fund for financial assistance.

§363.1205. Interest Rates for Loans.

(a) For loans from the Water Infrastructure Fund, the following procedures will be used to set fixed interest rates.

(1) The executive administrator will set fixed interest rates under this section for loans on a date that is five business days prior to the political subdivision's adoption of the ordinance or resolution authorizing its bonds and not more than 45 days before the anticipated closing of the loan from the board. After 45 days from the establishment of the interest rate of a loan, rates will be reconsidered, and may be extended only with the approval of the executive administrator.

(2) For loans from the fund, the executive administrator will set the interest rates in accordance with the following:

(A) to the extent that the source of funding is provided from bond proceeds issued through the Water Development Fund, the lending rate scale(s) will be determined as provided under §363.33(b) of this title (relating to Interest Rates for Loans and Purchase of Board's Interest in State Participation Projects);

(B) Although the program is designed to provide borrowers with a 200 basis point reduction from the market rate based on a level debt service schedule, in no event shall the loan interest rate as determined under this section be less than zero;

(C) The loan interest rate will be determined based on a debt service schedule that provides interest only will be paid in the first year of the debt service schedule and in which the annual debt service payments are level, as determined by the executive administrator. The executive administrator will identify the appropriate scale for the borrower and identify the market rate for the maturity due in each year. The executive administrator will reduce that market rate by 200 basis points and thereby identify a proposed loan interest rate for each maturity. The proposed loan interest rate will be applied to the proposed principal repayment schedule.

(D) For loans made under §363.1203(a)(2) of this title (relating to Use of Funds), which receive deferred principal and interest payments, the executive administrator will identify the appropriate scale for the borrower and identify the market rate for the maturity due in each year. The executive administrator will reduce that market rate by 200 basis points and thereby identify a proposed loan interest rate for each maturity. The proposed loan interest rate will be applied to the proposed principal repayment schedule.

(b) The board will establish separate lending rate scales for loans according to source of funds, if any funds other than Water Development Fund bond proceeds are used.

§363.1206. Pre-design Funding Option.

(a) This loan application option will provide an eligible applicant that meets all applicable board requirements an alternative to secure a commitment and close a loan for the pre-design, design or building costs associated with funding of a project under §363.1203(b)(1) of this title (relating to Use of Funds). Under this option, a loan may be closed and funds necessary to complete planning and design activities

released. If planning requirements have not been satisfied, design and building funds will be held or escrowed and released in the sequence described in this section. Following completion of planning activities and environmental assessment, the executive administrator may require the applicant to make changes in order to proceed with the project. If the portion of a project associated with funds in escrow cannot proceed, the loan recipient shall use the escrowed funds to redeem bonds purchased by the board in inverse order of maturity.

(b) Reservoir projects are not eligible for funding under this option.

(c) The executive administrator may recommend to the board the use of this section if, based on available information, there appear to be no significant permitting, social, environmental, engineering, or financial issues associated with the project. An application for pre-design funding may be considered by the board despite a negative recommendation from the executive administrator.

(d) Applications for pre-design funding must include the following information:

(1) for loans including building cost, a preliminary engineering feasibility report which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current and future populations and projected water needs and sources; alternatives considered; and a discussion of known permitting, social or environmental issues which may affect the alternatives considered and the implementation of the proposed project;

(2) contracts for engineering services;

(3) evidence that an approved water conservation plan will be adopted prior to the release of loan funds;

(4) all information required in §363.12 of this title (relating to General, Legal and Fiscal Information); and

(5) any additional information the executive administrator may request to complete evaluation of the application.

(e) After board commitment and completion of all closing and release prerequisites as specified in §363.42 of this title (relating to Loan Closing) and §363.43 of this title (relating to Release of Funds), funds will be released in the following sequence:

(1) for planning and permitting costs, after receipt of executed contracts for the planning or permitting phase;

(2) for design costs, after receipt of executed contracts for the design phase and upon approval of an engineering feasibility report as specified in §363.13 of this title (relating to Engineering Feasibility Data) and compliance with §363.14 of this title (relating to Environmental Assessment); and

(3) for building costs, after issuance of any applicable permits, and after bid documents are approved and executed construction documents are contingently awarded.

(f) Board staff will use preliminary environmental data provided by the applicant, as specified in subsection (d) of this section and make a written report to the executive administrator on known or potential significant social or environmental concerns. Subsequently, these projects must have a favorable executive administrator's recommendation which is based upon a full environmental review during planning, as provided under §363.14 of this title.

(g) The executive administrator will advise the board concerning projects that involve major economic or administrative impacts to the applicant resulting from environmentally related special mitigative or precautionary measures from an environmental assessment under §363.14 of this title.

§363.1207. Prioritization System.

(a) The executive administrator will prioritize all applications not previously considered by the board on February 1 and September 1 of each year. An application must be submitted by January 1 to be prioritized on February 1. An application must be submitted by August 1 to be prioritized on September 1. The executive administrator will provide the prioritization to the board in February and September of each year.

(b) Prior to each board meeting at which applications may be considered, the executive administrator shall:

(1) for each application that the executive administrator has determined is complete, prioritize the applications by the criteria identified in §363.1208 of this title (relating to Prioritization Criteria).

(2) provide to the board a list of all completed applications, the amount of funds requested and the priority of each application received and

(3) identify to the board, the total amount of funds available in the Water Infrastructure Fund for new applications.

(c) If there are funds in the Water Infrastructure Fund to fund all or part of any of the projects for which the executive administrator has received completed applications during the preceding six months, the board will first consider any projects that the legislature has determined shall receive priority for financial assistance from the Water Infrastructure Fund or legislative designation. If, after considering projects with legislative priority or legislative designation, there are funds available for other eligible projects in the Water Infrastructure Fund, then the board will consider such other applications received by the executive administrator during the preceding six month period in descending order of priority according to §363.1208 of this title. The board will consider the next application on the list only if there are funds available in the account to fund all or, if acceptable to the applicant, a part of the application.

§363.1208. Prioritization Criteria.

The factors to be used by the executive administrator to prioritize projects seeking financial assistance from the Water Infrastructure Fund shall be as follows:

(1) priority will be given to projects which result in the development of a new, usable supply of water;

(2) priority will be given to projects which have the earliest identified need, as identified in the water plan;

(3) priority will be given to entities that:

(A) have already demonstrated significant water conservation savings; or

(B) will achieve significant water conservation savings by implementing the proposed project for which the financial assistance is sought.

(4) priority will be given to projects that meet the stated purposes of the water plan as per Texas Water Code §16.051.

§363.1209. Findings Required.

The board, by resolution, may approve the application if it finds that:

(1) the application and the assistance applied for meet the requirements of this subchapter and board rules;

(2) the revenue or taxes, or both revenue and taxes, pledged by the applicant will be sufficient to meet all obligations assumed by the political subdivision; and

(3) the project will meet water needs in a manner consistent with the state and regional water plans as required by Texas Water Code, §16.053(j).

§363.1210. Action of the Board on Application.

At the conclusion of the meeting to consider the project, the board may resolve to approve, disapprove, approve with conditions, or continue consideration of the application. A commitment will include a date after which the financial assistance will no longer be available. That date shall be the end of that month which is twelve months from the month of commitment.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200704710
Joe Reynolds
Attorney
Texas Water Development Board
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 463-8249

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CHAPTER 368. FLOOD MITIGATION ASSISTANCE PROGRAM

31 TAC §368.4, §368.10

The Texas Water Development Board (board) proposes amendments to §368.4 and §368.10, concerning Grant Applications and Notice and Funding Limitations under the Flood Mitigation Assistance Program. Amendments to these sections are proposed to provide for greater efficiency and increased responsiveness in the event of disaster. This rulemaking is undertaken as a result of the board's internal review and process identification, and in coordination with the Federal Emergency Management Agency's (FEMA) efforts to maximize the availability of grant funds.

The proposed amendment to §368.4 deletes the words "As funds become available", eliminating the requirement that FEMA funds be available before the board's executive administrator publishes notice in the *Texas Register* requesting applications for grants. The purpose of this amendment is to allow the executive administrator more flexibility by removing the requirement that notice only be published when funds are available. Funds could therefore be made available to existing applicants as they become available to the board.

The proposed amendment to §368.10 adds the words "the executive administrator may seek and" to clarify that the board has delegated authority to the executive administrator to act immediately to request a waiver of funding limits from FEMA in order to immediately respond in the event a disaster is declared by the President of the United States.

Melanie Callahan, Chief Financial Officer, has determined that for the first five-year period the amendments are in effect, there will be no fiscal implications to state or local governments as a result of administration of the amended sections.

Ms. Callahan has also determined that for the first five years the amendments, as proposed, are in effect, the public benefit anticipated will be the clarification of the amended rules. Ms. Callahan has determined there will be no economic costs to small businesses or individuals required to comply with the amendments as proposed.

Comments on the proposal will be accepted for 30 days following publication and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, or by e-mail to rulescomments@twdb.state.tx.us or by fax at (512) 463-5580.

The amendments are proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties in the Texas Water Code and other laws of the State, and Chapter 742, §742.003(b), Texas Government Code, which governs the board's responsibilities in administering the Flood Mitigation Assistance Program for FEMA.

These amendments help implement and assist state and local governments in funding cost-effective actions that reduce or eliminate the long-term risk of flood damage to structures. The long term goal is to reduce or eliminate insurance claims through mitigation activities.

No other code, statute or article is affected by this proposal.

§368.4. Grant Applications and Notice.

(a) The [~~As funds become available through FEMA, the~~] executive administrator will publish notice in the *Texas Register* requesting applications from eligible communities for planning grants and/or project grants. Applicants shall submit application(s) in the form and in the numbers prescribed by the executive administrator. Applicants for planning grants shall provide notice of their grant applications in the manner required by §355.8 of this title (relating to Notice Requirements). The executive administrator may request additional information needed to evaluate the application, and may return any incomplete applications.

(b) Applications received by the deadline published in the *Texas Register* will be evaluated as described in this chapter. If there is an insufficient number of applications to allow effective utilization of federal funds, the board may republish notice and set a new deadline for applications or accept applications past the original deadline.

§368.10. Funding Limitations.

(a) Local cost share. Funding will be limited to no more than 75% of the total cost of the planning or project. Of the 25% to be provided by non-federal sources, no more than half can come from in-kind services, if directly in support of the project, properly documented, approved in advance by the board, and in conformance with federal cost-share limits in 44 CFR Part 13, and OMB Circular A-87.

(b) Planning grants. A planning grant will not be awarded to a community more than once every five years, and will not exceed a funding limit of $50,000 to any single community applicant. The total amount of all planning grants cannot exceed $300,000 in any federal fiscal year.

(c) Project grants. The total amount of project grant funds provided during any five-year period cannot exceed $3.3 million to any community. The total amount of project grant funds provided to all communities located in the state will not exceed $20 million during any five-year period. In the event that a disaster is declared by the President in a State or community as a result of flooding, the executive administrator may seek and FEMA has the authority to waive these assistance limits.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200704727
Joe Reynolds
Attorney
Texas Water Development Board
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 936-2414

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CHAPTER 382. WATER INFRASTRUCTURE FUND

The Texas Water Development Board (the board) proposes the repeal of 31 Texas Administrative Code (TAC) §§382.1 - 382.6, 382.21 - 382.26, and 382.41 - 382.43 relating to the Water Infrastructure Fund (WIF). Sections 382.1 - 382.6, 382.21 - 382.26, and 382.41 - 382.43, which established procedures relating to applications for financial assistance from the WIF will be superseded by proposed new WIF rules at 31 TAC Chapter 363, Subchapter L, published separately. This will consolidate the rules relating to the board's state-based funding programs.

Melanie Callahan, Chief Financial Officer, has determined that there will be no fiscal implications for state or local governments as a result of the repeal of these rules.

Ms. Callahan has also determined that for each year of the first five years the proposed repeal is in effect, the public will benefit from the repeal because the repeal and consolidation will make the board's state-based funding programs more easily accessible to the public. In addition, the repeal and associated consolidation will provide greater efficiency in administering the various programs.

Comments on the proposed repeal of §§382.1 - 382.6, 382.21 - 382.26, and 382.41 - 382.43 will be accepted for 30 days following publication and may be submitted to Legal Services, Texas Water Development Board, P.O. Box 13231, Austin, Texas 78711-3231, by email to rulescomments@twdb.state.tx.us, or by fax at (512) 463-5580.

SUBCHAPTER A. INTRODUCTORY PROVISIONS

31 TAC §§382.1 - 382.6

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

This repeal is proposed under §6.101, Water Code, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board pursuant to §15.605, Water Code, which requires the board to adopt rules to administer the fund.

Statutory authority: Texas Water Code §6.101. The repeal of these sections is proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties of the board. No other statute or codes are affected by this repeal.

§382.1. Scope of Chapter.
§382.2. Definitions of Terms.
§382.3. Use of Funds.
§382.4. Availability of Funds.
§382.5. Interest Rates for Loans.
§382.6. Investment of Funds.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200704697
Joe Reynolds
Attorney
Texas Water Development Board
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For further information, please call: (512) 463-8249

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SUBCHAPTER B. APPLICATION PROCEDURES

31 TAC §§382.21 - 382.26

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

This repeal is proposed under §6.101, Water Code, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board pursuant to §15.605, Water Code, which requires the board to adopt rules to administer the fund.

Statutory authority: Texas Water Code §6.101. The repeal of these sections is proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties of the board. No other statute or codes are affected by this repeal.

§382.21. Preapplication Meeting.
§382.22. Application for Assistance.
§382.23. Pre-design Funding Option.
§382.24. Board Consideration of Application.
§382.25. Findings Required.
§382.26. Action of the Board on Application.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Joe Reynolds
Attorney
Texas Water Development Board
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SUBCHAPTER C. CLOSING AND RELEASE OF FUNDS

31 TAC §§382.41 - 382.43

(Editor's note: The text of the following sections proposed for repeal will not be published. The sections may be examined in the offices of the Texas Water Development Board or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

This repeal is proposed under §6.101, Water Code, which authorizes the board to adopt rules necessary to carry out the powers and duties of the board pursuant to §15.605, Water Code, which requires the board to adopt rules to administer the fund.

Statutory authority: Texas Water Code §6.101. The repeal of these sections is proposed under the authority of the Texas Water Code §6.101, which provides the board with the authority to adopt rules necessary to carry out the powers and duties of the board. No other statute or codes are affected by this repeal.

§382.41. Loan Closing.

§382.42. Release of Funds.

§382.43. Engineering Design Approvals.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Joe Reynolds
Attorney
Texas Water Development Board
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TITLE 34. PUBLIC FINANCE

PART 4. EMPLOYEES RETIREMENT SYSTEM OF TEXAS

CHAPTER 81. INSURANCE

34 TAC §81.9

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code (TAC) Chapter 81, concerning Insurance.

Section 81.9, concerning Grievance Procedure, is amended in order to make it conform with 34 TAC Chapter 67, concerning Hearings on Disputed Claims, which states that: (a) the definition of "Executive Director" includes her designee within the scope of the defined term; (b) the Board has statutory authority to delegate to the Executive Director its authority to decide appeals in ERS proceedings; and (c) the Executive Director has discretion to refer particular cases to the Board for final determination when appropriate. In addition, a reference to the TRICARE Supplement Plan in §81.9(a) has been removed due to recently passed federal legislation that prohibits offering an incentive for a participant to waive his employer health coverage.

Ms. Paula A. Jones, General Counsel, Employees Retirement System of Texas, has determined that for the first five year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules, and, to her knowledge, small businesses should not be affected.

Ms. Jones also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be simplified administration for the Texas Employees Group Benefits Program, as the rule will conform to the Board's approved and previously promulgated rules for administrative appeals. There are no known anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is 10:00 a.m. on November 19, 2007.

The amendments are proposed under Texas Insurance Code, §1551.052 which provides authorization for the ERS Board of Trustees to adopt rules necessary to implement Texas Insurance Code, Chapter 1551, and to carry out its purposes, and under Government Code, §815.102 which provides authorization for the ERS Board of Trustees to adopt rules for hearings on contested cases or disputed claims. No other statutes are affected by the proposed amendment.

§81.9. Grievance Procedure.

(a) Except for persons enrolled in an HMO, [~~or the TRICARE Supplement plan~~] any person participating in the insurance program[~~,~~] who is denied payment of insurance benefits, or otherwise receives an adverse decision, may request the carrier or administering firm to reconsider the claim. Any additional documentation in support of the claim may be submitted with the request for reconsideration. If the claim is again denied, the claim, accompanied by all related documents and copies of correspondence with the insurance carrier or administering firm, may be submitted by the person to the Executive Director of the Employees Retirement System of Texas or the Executive Director's designee for review. A request for grievance [~~review~~] must be filed by the person in writing within 90 days from the date the insurance carrier or administering firm formally denies the claim, or provides notice of other adverse decision, and mails notice of this denial and grievance right of appeal to the person.

(b) Any participant with a grievance regarding eligibility or other matters involving the Program, including eligibility for participation in the premium conversion plan, may submit a written request to the Executive Director or the Executive Director's designee to make a determination on the matter in dispute.

(c) When the Executive Director or the Executive Director's designee reviews any matter arising under this section, all of the available information will be considered. When the Executive Director or the Executive Director's designee completes the review and makes a decision, all parties involved will be notified in writing of the decision.

(d) Any participant that does not accept the Executive Director's or the Executive Director's designee's decision may appeal the decision to the Board's designee [~~board~~] provided the decision grants a right of appeal. A notice of appeal to the Board's designee [~~board~~] must be in writing and filed with ERS 30 days from the date the Executive Director's or the Executive Director's designee's decision is mailed by certified or first class mail.

(e) Appeals to the Board's designee [~~board~~] will be processed under the provisions of Chapter 67 of this title (relating to Hearings and Disputed Claims)[~~, or the rules of the State Office of Administrative Hearings, when applicable, and Chapter 2001, Government Code~~].

(f) As used in this section, the term "participant" includes any duly authorized representative of such person as permitted by Chapter 67 of this title.

(g) In computing time under this section, the day after any mailing by the carrier, [~~or the~~] Executive Director or the Executive Director's designee shall be counted as the first day of the time period. A document is considered to be filed with the Executive Director or the Executive Director's designee when it is received by the executive director or the Executive Director's designee or when it is postmarked, whichever is earlier.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200704729
Paula A. Jones
General Counsel
Employees Retirement System of Texas
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For further information, please call: (512) 867-7421

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CHAPTER 85. FLEXIBLE BENEFITS

34 TAC §85.1, §85.5

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code (TAC) Chapter 85, concerning the Flexible Benefits Program.

Section 85.1 (Introduction and Definitions) and §85.5 (Benefits) are amended to define and direct the administration of the State of Texas Employees Flexible Benefit Program (TexFlex) and to clarify the rules. These sections are also being amended in order to comply with and conform to the provisions of the Internal Revenue Code, as amended, and Texas Insurance Code, Chapter 1551.

Section 85.1 amends the definition of Debit Card and also adds to the definition of Dependent.

Section 85.5, regarding the maximum benefit available, is amended by specifying that the participant shall redirect the annual election in nine equal installments of $555. If married and filing a separate income tax return, the participant shall redirect the annual election in nine equal installments of $277.

Paula A. Jones, General Counsel, has determined that for the first five year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules, and, to her knowledge, small businesses will not be affected.

Ms. Jones also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules will be simplified administration of the Texas Employees Flexible Benefit Program in accordance with recent changes to the law. There are no known or anticipated economic costs to persons who are required to comply with the rules as proposed, except for any costs associated with continued participation in the TexFlex program.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is 10:00 a.m. on November 19, 2007.

The amendments are proposed under Texas Insurance Code §1551.052, which provides authorization for the ERS Board of Trustees to adopt rules necessary to implement this chapter and its purposes and to carry out its purposes. No other statutes are affected by these proposed amendments.

§85.1. Introduction and Definitions.

(a) - (b) (No change.)

(c) Definitions. The following words and terms when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise, and wherever appropriate, the singular includes the plural, the plural includes the singular, and the use of any gender includes the other gender.

(1) - (6) (No change.)

(7) Debit Card--A bank issued convenience card or similar technology approved by the plan administrator and permitted to be used by participants as an optional method to pay for eligible transactions. Use of the card is governed by the plan administrator and issuing financial institution. The card is referred to as the Flex Debit Card [~~TexFlex Convenience Card~~].

(8) Dependent--An individual who qualifies as a dependent under the Code, §152, and when applicable taking into account the Code, §105, or any individual who is:

(A) (No change.)

(B) a dependent or spouse of the participant who is physically or mentally incapable of caring for himself or herself.

(9) - (38) (No change.)

§85.5. Benefits.

(a) (No change.)

(b) Health care reimbursement plan.

(1) (No change.)

(2) Maximum benefit available. Subject to the limitations set forth in these rules, hereafter referred to as the plan, to avoid discrimination, the maximum amount of flexible benefit dollars that an employee may receive in any plan year for health care expenses under the health care reimbursement plan is $5,000. Except as otherwise provided in this paragraph, the monthly maximum salary reduction amount, exclusive of any administrative fees, may not exceed $416 per month. An employee may prepay the health care election amounts for the remainder of the plan year in anticipation of termination, retirement, or a period of leave without pay. An employee classified as a nine-month employee and who receives compensation in fewer than 12 months shall redirect the annual election amount in nine equal monthly amounts of $555, or if married and filing a separate income tax return, of $277.

(c) Dependent care reimbursement plan.

(1) (No change.)

(2) Maximum benefit available.

(A) Subject to any limitations imposed by these rules, hereafter referred to as the plan, to avoid discrimination, the maximum amount that an employee may receive in any plan year in the form of payment of or reimbursement for dependent care expenses under the dependent care reimbursement plan is the lesser of:

(i) - (ii) (No change.)

(iii) $5,000. ($2,500 in the case of a married employee who files a separate federal income tax return.) Except as otherwise provided in this clause, the monthly maximum salary reduction amount, exclusive of any administrative fees, may not exceed $416 per month or $208 per month in the case of a married employee who files a separate federal income tax return. An employee classified as a nine-month employee and who receives annual compensation in fewer than 12 months shall redirect the election amount in nine equal monthly amounts of $555, or if married and filing a separate income tax return, of $277.

(B) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Paula A. Jones
General Counsel
Employees Retirement System of Texas
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CHAPTER 87. DEFERRED COMPENSATION

34 TAC §§87.1, 87.3, 87.5, 87.7, 87.9, 87.17, 87.19, 87.33

The Employees Retirement System of Texas (ERS) proposes amendments to 34 Texas Administrative Code (TAC) Chapter 87 concerning Deferred Compensation. The amendments to §§87.1, 87.3, 87.5, 87.7, 87.9, 87.17, 87.19 and 87.33 are needed in order to update the Plan rules to clarify Plan requirements, and to comport with federal and state law and administrative requirements. The amendments allow for the maximum amount of deferrals permitted by tax law, while providing for the strict and careful monitoring of limits that may apply under such tax laws and Internal Revenue Service regulations.

Section 87.1, concerning Definitions, is amended to add certain definitions (Inherited IRA) and to exclude the University of Texas System as an eligible entity in the definition of State agency due to changes in state law. It also adds and revises certain definitions due to changes in state and federal law.

Sections 87.1, 87.3, 87.5, 87.7, 87.17 and 87.19 are amended to revise the term "agency coordinator" to "benefits coordinator" to conform with terminology used by ERS in other Programs.

Sections 87.3, 87.5 and 87.33 concerning Administrative and Miscellaneous Provisions, Participation by Employees, are amended to adjust the annual deferral limit to the amount allowed by the Internal Revenue Service without the requirement for future rule amendments.

Section 87.9, concerning Investment Products, is amended to include target date retirement funds, as qualified investment products in the 457 Plan.

Ms. Paula A. Jones, General Counsel, Employees Retirement System of Texas, has determined that for the first five year period the rules are in effect, there will be no fiscal implications for state or local government as a result of enforcing or administering the rules, and, to her knowledge, small businesses should not be affected.

Ms. Jones also determined that for each year of the first five years the rules are in effect the public benefit anticipated as a result of enforcing the rules would be added flexibility for and protection of State of Texas Deferred Compensation Plan participants, and the ability for plan participants to utilize the maximum amount of deferrals as permitted by federal tax law. There are no known anticipated economic costs to persons who are required to comply with the rules as proposed.

Comments on the proposed rule amendments may be submitted to Paula A. Jones, General Counsel, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207, or you may email Ms. Jones at paula.jones@ers.state.tx.us. The deadline for receiving comments is 10:00 a.m. on November 19, 2007.

These amendments are proposed under Government Code, §609.508, which provides authorization for the ERS Board of Trustees to adopt rules necessary to administer the deferred compensation plan. No other statutes are affected by these proposed amendments.

§87.1. Definitions.
The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Account--A record that a prior plan vendor or revised plan vendor uses to record the value of the deferred compensation activity credited to the participant, including annual deferrals, earnings or investment losses, transfers and any distributions made to a participant or on behalf of the participant's beneficiary.

~~[(2) Agency coordinator--An employee of a state agency who has been designated by the agency to perform certain administrative functions with respect to the plan.]~~

(2) [~~(3)~~] Basic pension plan--The retirement program in which an employee must participate.

(3) [~~(4)~~] Beneficiary--The designated person (or if none, the participant's estate) who is entitled to receive benefits under the plan after the death of a participant.

(4) [~~(5)~~] Beneficiary designation form--A form authorized and approved by the plan administrator to designate a participant's beneficiary.

(5) Benefits coordinator--An employee of a state agency who has been designated by the agency to perform certain administrative functions with respect to the plan.

(6) Board of Trustees--The Board of Trustees of the Employees Retirement System of Texas.

(7) Call-in day--The first five working days of the month.

(8) Change agreement--A contract signed by a participant to request certain changes concerning the participant's deferrals, investment income, and participation in the plan.

(9) Code--The Internal Revenue Code of 1986, as now in effect or as hereafter amended. All citations to sections of the Code are to such sections as they may from time to time be amended or renumbered.

(10) Data collection center--A private entity used by the State Treasury Department to collect information from state depositories regarding deposits of state funds.

(11) Day--A calendar day.

(12) DCP--Deferred compensation plan.

(13) Deferral--The amount of compensation a participant has agreed to defer under the plan.

(14) Distribution agreement--A contract signed by a participant or beneficiary indicating the disposition of the participant's deferrals and investment income.

(15) Disclosure form--A document completed by a prior plan vendor's representative and signed by the vendor representative disclosing the rate of return, fees, withdrawal penalties, and payout options for the qualified investment product selected.

(16) Eligible rollover distribution--Any distribution of all or any portion of a participant's account balance, including an individual retirement account described in §408(a) of the Code, an individual retirement annuity described in §408(b) of the Code, a qualified trust described in §401(a) of the Code, an annuity plan described in §403(a) or §403(b) of the Code, that accepts the rollover distribution, except that an eligible distribution does not include:

(A) any installment payment for a period of 10 years or more;

(B) any distribution as a result of an unforeseeable emergency; or

(C) for any other distribution, the portion, if any, of the distribution that is required under §401(a)(9).

(17) Enrollment form--formerly known as participation agreement. A contract signed by an employee agreeing to defer the receipt of part of the employee's compensation in accordance with the plan and containing certain information regarding prior plan vendors, investment products, and other matters.

(18) Emergency withdrawal application--A form completed by a participant requesting the full or partial distribution of the participant's deferrals and investment income because of an unforeseeable emergency.

(19) Employee--A person who provides services as an officer or employee to a state agency.

(20) Executive director--The executive director of the Employees Retirement System of Texas.

(21) FDIC--The Federal Deposit Insurance Corporation or its successor in function. The FDIC consists of two funds, the Savings Association Insurance Fund (SAIF), which insured savings associations and savings banks, and the Bank Insurance Fund (BIF), which insures commercial banks.

(22) Fee--The term includes a fee, penalty, charge, assessment, market value adjustment, forfeiture, or service charge.

(23) Includible income--The total of:

(A) the value of salary or wages;

(B) plus the value of longevity pay, hazardous duty pay, imputed income, special duty pay, sick, vacation, back pay and benefit replacement pay; and

(C) minus the present value of contributions to the Employees Retirement System, the Teacher Retirement System, the Optional Retirement Program, and the TexFlex program administered by the Employees Retirement System.

(24) Home office--The primary location at which a prior plan vendor maintains its files and other records concerning the vendor's participation in the plan and the participants whose deferrals and investment income have been invested in the vendor's qualified investment products. The term is usually equivalent to the vendor's headquarters.

(25) Inactive prior plan vendor--A prior plan vendor is an inactive prior plan vendor if no new deferrals have been invested in any of the vendor's qualified investment products for 12 consecutive months.

(26) Includible compensation--An employee's actual wages in box 1 of Form W-2 for a year for services and compensation from a state agency that is includible in a participant's includible income under §401(a)(17) of the Code and increased (up to the dollar maximum) by any compensation reduction election under §§125, [§]132(f), [§]401(k), [§]403(b) or [§]457(b) of the Code.

(27) Inherited IRA --An IRA that becomes property through inheritance of someone other than the spouse of the deceased owner of the IRA. The beneficiary must receive the distribution by December 31 of the fifth year after the death of the owner. This type of IRA does not allow for tax deductible contributions nor rollovers to and from other IRAs. The IRA can be paid as an annuity or in periodic installments not extending beyond the beneficiary's life expectancy.

(28) [~~(27)~~] Investment income--The interest, capital gains, and other income earned through the investment of deferrals in qualified investment products.

(29) [~~(28)~~] Investment product--The term includes a life insurance product, fixed or variable rate annuity, stable value account, mutual fund, certificate of deposit, money market account, self-directed brokerage account, or passbook savings account. An investment product that is in any respect different from another investment product of the same vendor is a different investment product.

(30) [~~(29)~~] Investment provider--a prior plan vendor or revised plan vendor that offers an investment product in the plan.

(31) [~~(30)~~] Qualified military service--a uniformed service while on active or inactive duty, including training periods. Uniformed services include the Army, Navy, Marine Corps, Air Force, Coast Guard, and Public Health Service Commission Corps, the reserve components of those services as well as training or service in the National Guard or Air National Guard and any other category of persons designated by the President in a time of war or emergency.

(32) [~~(31)~~] NCUA--National Credit Union Administration, a United States Government Agency, which regulates charters and insures deposits of the nation's federal credit unions. Shares and deposits in credit unions are insured by the NCUSIF as detailed in this section.

(33) [~~(32)~~] NCUSIF--National Credit Union Share Insurance Fund, is administered by the NCUA as detailed in this section and insures members' share and deposit accounts at federally insured credit unions.

(34) [~~(33)~~] Non-filer--A prior plan vendor which does not ensure that the plan administrator receives a quarterly report by the due date specified in §87.19(d)(1) of this title (relating to Reporting and Recordkeeping by Prior Plan Vendors).

(35) [~~(34)~~] Non-spousal beneficiary--Any beneficiary other than a spouse or ex-spouse.

(36) [~~(35)~~] Normal retirement age--A range of ages beginning with the earliest age at which a person is eligible to retire under the participant's basic pension plan as referenced in §87.5(g) of this title (relating to Participation by Employees).

(37) [~~(36)~~] One-time election form--A form completed by a participant requesting the full distribution of deferred compensation funds with a total balance that does not exceed the dollar limit under

the Code §457(e)(9), EGTRRA, or the dollar limit under §411(a)(11) of the Code, if greater, as of the date that payments commence. Also known as the de minimis distribution election.

(38) [~~(37)~~] Participant--A current, retired, or former employee who either has elected to defer a portion of the employee's current compensation, previously deferred compensation or has a balance in the plan.

(39) [~~(38)~~] Participation agreement--A contract signed by an employee agreeing to defer the receipt of part of the employee's compensation in accordance with the plan and containing certain information regarding prior plan vendors, investment products, and other matters.

(40) [~~(39)~~] Plan--The deferred compensation program of the state of Texas that is governed by the Code §457 and authorized by Chapter 609, Government Code. This plan is a continuation of the plan previously administered by the Comptroller of Public Accounts.

(41) [~~(40)~~] Plan administrator--The Board of Trustees of the Employees Retirement System of Texas or its designee.

(42) [~~(41)~~] Prior plan--Refers to the State of Texas 457 Deferred Compensation Plan, the vendors and products approved by the Board of Trustees of the Employees Retirement System of Texas prior to September 1, 2000.

(43) [~~(42)~~] Prior plan vendor--A vendor in the prior plan with whom the plan administrator has signed a vendor contract. The term includes a prior plan vendor's officers and employees. The prior plan vendor may be an insurance company, bank, savings and loan, credit union, or mutual fund. The term applies only to vendors approved and implemented by the Board of Trustees before January 1, 2000.

(44) [~~(43)~~] Product approval notice--A written notice from the plan administrator to a prior plan vendor informing the vendor that a particular investment product has been approved for participation in the plan.

(45) [~~(44)~~] Product contract--A contract between an investment provider and the plan administrator concerning the participation of one of the vendor's investment products in the plan.

(46) [~~(45)~~] Product type--A categorization of an investment product according to its relevant characteristics. Examples of product types are life insurance products, mutual funds, certificates of deposit, savings accounts, share accounts, stable value account, self-directed brokerage account, and annuities.

(47) [~~(46)~~] Public safety employee--Any employee of a state or political subdivision who provides police protection, firefighting services, or emergency medical services for any area within the jurisdiction of such state or political subdivision. It may also include a chaplain or a member of an ambulance or rescue crew. This does not include judges, Texas Department of Criminal Justice guards, probation, parole, juvenile delinquency or similar officers.

(48) [~~(47)~~] Qualified investment product--An investment product concerning which the plan administrator and the sponsoring prior plan or revised plan vendor have signed a product contract.

(49) [~~(48)~~] Revised plan--Refers to the State of Texas 457 Deferred Compensation Plan and the vendors and products approved by the Board of Trustees of the Employees Retirement System of Texas after August 31, 2000 for the Texa$aver program. The term "Texa$aver program" is used as it is defined in Texas Government Code §609.502.

(50) [~~(49)~~] Revised plan vendor--An insurance company, brokerage firm, or mutual fund distributor that sells investment products in the revised plan. The term includes a vendor's officers and/or employees. This applies only to vendors approved and implemented by the Board of Trustees subsequent to December 31, 1999.

(51) [~~(50)~~] Separation from service--A termination of the employment relationship between a participant and the participant's employing state agency, as determined in accordance with the agency's established practice. The term excludes a paid or unpaid leave of absence.

(52) [~~(51)~~] Spousal beneficiary--The current or ex-spouse of a participant who is designated to receive a participant's account balance.

(53) [~~(52)~~] State agency--A board, commission, office, department, or agency in the executive, judicial, or legislative branch of state government. The term includes an institution of higher education as defined by the Education Code, §61.003. The term shall not include the University of Texas System.

(54) [~~(53)~~] Third Party Administrator (TPA)--An entity under the direction of the plan administrator that operates independently of both the employer and investment providers to perform agreed upon administrative services to a tax-deferred defined contribution plan. These tasks may include recordkeeping, preparation of participant statements, monitoring deferral limits, and other specified services.

(55) [~~(54)~~] Transfer--The redemption of deferrals and investment income from a qualified investment product for investment in another qualified investment product.

(56) [~~(55)~~] Trust--The deferred compensation trust fund established to hold and invest deferrals and investment income under the plan for the exclusive benefit of participants and their beneficiaries.

(57) [~~(56)~~] Trustee--The Board of Trustees of the Employees Retirement System of Texas.

(58) [~~(57)~~] Unforeseeable emergency distribution--A severe financial hardship of the participant resulting from: an illness or accident, loss of property due to casualty, funeral expenses or other extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the participant.

(59) [~~(58)~~] Valuation date--A point in time in which an asset is assigned a dollar value. It may be the designated time of closing (daily, last day of the calendar month, the last day of the calendar quarter, each December 31) for determination of account balances in a defined contribution plan.

(60) [~~(59)~~] Vendor contract--A contract between the plan administrator and an investment provider concerning the vendor's participation in the plan.

(61) [~~(60)~~] Vendor representative--An agent, independent agent, independent contractor, or other representative of a prior plan who is not an employee or officer of the vendor.

(62) [~~(61)~~] 401(a)(9), §401(a)(9) and Section 401(a)(9)--These terms refer to Internal Revenue Code §401(a)(9).

(63) [~~(62)~~] 457, §457 and Section 457--These terms refer to Internal Revenue Code §457.

§87.3. Administrative and Miscellaneous Provisions.

(a) Plan administrator.

(1) The plan administrator shall administer all aspects of the plan.

(2) The plan administrator shall:

(A) act for the state in all administrative matters concerning the plan;

(B) adopt and amend rules that are consistent with state and federal law;

(C) enter into necessary contracts; and

(D) take whatever action is necessary to ensure compliance with state and federal law and the sections in this chapter.

(b) Participation by state agencies in the plan.

(1) Commencing participation in the plan.

(A) A state agency may commence participation in the plan by:

(i) sending a written notice from its head of agency to the plan administrator; and

(ii) complying with the plan administrator's documentary, training, and other requirements for participation in the plan.

(B) The plan administrator may determine the effective date of a state agency's participation in the plan.

(C) If the plan administrator does not determine the effective date in accordance with subparagraph (B) of this paragraph, this subparagraph applies.

(i) If the plan administrator receives the written notice on the first day of a month, then the state agency's participation in the plan is effective on the first pay date of the following month.

(ii) Otherwise, the state agency's participation in the plan is effective on the first pay date of the second month following the month in which the plan administrator receives the notice.

(2) Terminating participation in the plan.

(A) Voluntary termination.

(i) A state agency may terminate its participation in the plan by sending a written notice from its head of agency to the plan administrator.

(ii) If the plan administrator receives the notice on the first day of a month, then the state agency's participation in the plan terminates on the first pay date of the third month following the month in which the plan administrator receives the notice. Otherwise, the state agency's participation in the plan terminates on the first pay date of the fourth month following the month in which the plan administrator receives the notice.

(iii) A state agency's termination of its participation in the plan does not entitle the agency's participants to a distribution of their deferrals and investment income.

(iv) A participant who is employed by a state agency that has terminated its participation in the plan may not make additional deferrals until either the agency resumes participating in the plan or the participant becomes employed by a state agency participating in the plan.

(v) The benefits coordinator [~~agency coordinator~~] of a state agency that has terminated its participation in the plan is not relieved from the responsibilities set forth in the sections in this chapter, except to the extent that the agency's participants will not be making additional deferrals to the plan.

(B) Involuntary termination or suspension.

(i) The plan administrator may terminate or suspend a state agency's participation in the plan if the agency or the agency's coordinator violates the sections in this chapter.

(ii) The plan administrator may determine the length of a suspension after considering all relevant circumstances.

(iii) The plan administrator may reinstate a state agency that has been terminated from participation in the plan if the plan administrator determines that the best interests of the plan would be served.

(iv) If the plan administrator terminates or suspends a state agency's participation in the plan, the agency's participants are not entitled to a distribution of their deferrals and investment income by virtue of the termination or suspension.

(v) The participant of a state agency that the plan administrator has terminated or suspended from participation in the plan may not make additional deferrals until the plan administrator reinstates the agency, the suspension ends, or the participant becomes employed by a state agency participating in the plan.

(vi) The agency administrator of a terminated or suspended state agency is not relieved from the responsibilities set forth in the sections in this chapter, except to the extent that the agency's participants will not be making additional deferrals to the plan.

(3) Benefits coordinator. A benefits coordinator's [~~Agency coordinators. An agency coordinator's~~] responsibilities may include:

(A) maintaining records concerning each participant as required by the plan administrator;

(B) keeping participation agreements on file;

(C) retaining the original copies of insurance policies and annuity contracts;

(D) ensuring that deferrals are properly deducted from a participant's salary and sent to the appropriate entity as directed by the plan administrator;

(E) monitoring the annual deferral limits for each plan participant to ensure the maximum annual deferral limit is within the amount allowed by the Internal Revenue Service [~~of the lesser of $15,500 (as adjusted)~~] or 100% of the participant's includible income is not exceeded;

(F) calculating and monitoring catch-up limits and furnishing the plan administrator with the applicable catch-up forms;

(G) ensuring that all forms and other paperwork are properly completed and forwarded to the appropriate party;

(H) balancing participant records and reconciling those records with the data provided by the prior plan vendors and the plan administrator;

(I) informing employees and participants about the plan, including the necessity to file distribution agreements in accordance with §87.17 of this title (relating to Distributions);

(J) acting as a buffer between employees and participants on the one hand and prior plan vendors on the other, although a benefits coordinator [~~an agency coordinator~~] is prohibited from providing investment advice;

(K) attempting to locate missing participants and beneficiaries in accordance with §87.17(q) of this title;

(L) assisting a participant who has retired or left state employment if the participant's last position in state government was with that particular agency that employs the benefits coordinator [~~agency coordinator~~];

(M) continuing to assist a participant with all deferred compensation matters if a participant transfers from a participating state agency to a non-participating state agency until the participant returns to a different participating agency;

(N) assisting the beneficiary of a participant whose last position in state government was with that particular state agency that employs the benefits coordinator [~~agency coordinator~~];

(O) notifying the plan administrator when a participant dies or separates from service; and

(P) performing any other duties specified in the sections in this chapter.

(c) Miscellaneous provisions.

(1) The participation in the plan of an investment provider or TPA, qualified investment product, state employee, vendor representative, or employee of a prior or revised plan vendor is subject to changes in federal law, federal regulations, state law, and the sections in this chapter.

(2) The fiscal year of the plan begins on January 1 of each year.

(3) The mailing address of the plan administrator is: Plan Administrator, Deferred Compensation §457 Plan, Employees Retirement System of Texas, P.O. Box 13207, Austin, Texas 78711-3207.

(4) If a provision in the sections in this chapter conflicts with a federal law, rule, or regulation governing the plan, then the law, rule, or regulation prevails over the provision.

(5) The participation of an employee in the plan does not give the employee a legal or equitable right against the participant's employing state agency, the plan administrator, or the state of Texas except as provided in the sections in this chapter. The plan does not affect the terms of employment between a participant and the participant's employing state agency.

(6) If a time limit is expressed in terms of a number of days and the last day of the time limit falls on a weekend or holiday recognized by the state of Texas for observance by state employees, the last day of the time period is the first business day after the weekend or holiday.

(7) The sections in this chapter prevail over any document used in the administration of the plan that has provisions or requirements which conflict with the sections.

(8) The interests of each participant or beneficiary under the plan are not subject to the claims of the participant's or beneficiary's creditors; and neither the participant nor any beneficiary shall have any right to sell, assign, transfer, or otherwise convey the right to receive any payments hereunder or any interest under the plan, which payments and interest are expressly declared to be non-assignable and non-transferable. This rule is applicable as referenced in §87.17(e)(7) of this title (relating to Distributions by Employees) for qualified domestic relations orders.

§87.5. Participation by Employees.

(a) Benefits of participation. The plan administrator shall cease to accept deferrals to investment products approved under the prior plan, with exception of life insurance products on or after September 1, 2000. Subject to any changes in federal law:

(1) a participant's deferrals are not subject to federal income taxation until the deferrals are paid or otherwise made available to the participant; and

(2) investment income is not subject to federal income taxation until it is paid or otherwise made available to the participant.

(b) Enrollment of participants in the plan.

(1) An employee may complete an enrollment form, enroll online or enroll through customer service representative at the TPA in the revised plan.

(2) If a participant has not selected an investment product to receive deferrals, the deferrals shall be invested in a product selected by the plan administrator at its sole discretion.

(c) Effective date of enrollment. A participant's enrollment in the Plan is effective for compensation earned beginning with the month following the month in which the participant enrolls.

(d) Eligibility. Employees are eligible to participate in the plan and defer compensation immediately upon becoming employed by a state agency. Employees of community colleges and junior colleges are eligible only if such community college or junior college has opted to participate in the Texa$aver 457 plan.

(e) Contents of a participation agreement used in the prior plan. A participation agreement must contain but shall not be limited to:

(1) the participant's consent for payroll deductions equal to the amount of deferrals during each pay period;

(2) the amount that will be deducted from the participant's compensation during each pay period;

(3) the prior plan vendor and qualified investment product in which the participant's deferrals will be invested;

(4) the date on which the payroll deductions will begin or end, as appropriate;

(5) the signature of an individual with authority to bind the prior plan vendor;

(6) the signature of an individual with authority to bind the participant; and

(7) an incorporation by reference of the requirements of state law and the sections in this chapter.

(f) Participants with existing life insurance products.

(1) This paragraph is effective until December 31, 1998. When a participant has deferrals and investment income in a life insurance product, the state of Texas:

(A) retains all of the incidents of ownership of the life insurance product;

(B) is the sole beneficiary of the life insurance product;

(C) is not required to transfer the life insurance product to the participant or the participant's beneficiary; and

(D) is not required to pass through the proceeds of the product to the participant or the participant's beneficiary.

(2) This paragraph is effective January 1, 1999, and thereafter. When a participant has deferrals and investment income in a life insurance product, the life insurance product shall be held in trust for the exclusive benefit of the participant and beneficiaries.

(g) Normal maximum amount of deferrals.

(1) The amount a participant defers during each tax year may not exceed the normal maximum amount of deferrals.

(2) The normal maximum amount of deferrals is the maximum amount allowed by the Internal Revenue Service [~~equal to the lesser of $15,500~~] (as periodically adjusted for cost-of-living in accordance with Code §457(e)(15)), §415(d), the Job Creation and Worker Assistance Act of 2002 and the Pension Protection Act of 2006, or 100% of a participant's includible compensation.

(3) The participant's employing agency will monitor the annual deferral limits for each plan participant to ensure the maximum annual deferral limit is within the maximum amount allowed by the Internal Revenue Service [~~of the lesser of $15,500 (as adjusted)~~] or 100% of a participant's includible income is not exceeded. Any state agency or employing agency that is uncertain what the appropriate maximum annual deferral limit is for a calendar year should contact the plan administrator to obtain that information. Each participant enrolling in the plan must provide the employing state agency any information necessary to ensure compliance with plan requirements, including, without limitation, whether the employee is a participant in any other eligible plan. If a participant makes deferrals in excess of the normal maximum annual deferral limit and is not participating under the catch-up provision, the following actions will be taken:

(A) Upon notification by the participant's agency, the prior plan vendor or TPA will return to the participant's agency the amount of deferrals in excess of the normal plan limits, that is, any amount exceeding the maximum amount allowed by the Internal Revenue Service [~~the lesser of $15,500 (as adjusted)~~] or 100% of the participant's includible income without any reduction for fees or other charges.

(B) Upon receipt of the funds, the participant's agency will reimburse the participant through its payroll system.

(4) If any deferral (or any portion of a deferral) is made to the plan by a good faith mistake of fact, then within one year after the payment of the deferral, and upon receipt in good order of a proper request approved by the plan administrator, the amount of the mistaken deferral (adjusted for any income or loss in value, if any, allocable thereto) shall be returned directly to the participant or, to the extent required or permitted by the plan administrator, to the participant's employing state agency.

(5) Disregard excess deferral. A participant is treated as not having deferred compensation under a plan for a prior taxable year to the extent excess deferrals under the plan are distributed, as described in paragraph (4) of this subsection. To the extent that the combined deferrals for pre-2002 years exceeded the maximum deferral limitations, the amount is treated as an excess deferral for those prior years.

(h) Three-year catch-up exception to the normal maximum amount of deferrals.

(1) This subsection provides a limited exception to the normal maximum amount of deferrals.

(2) In the event that a participant chooses to begin the three-year catch-up option, the participant is required to complete and provide the plan administrator with a copy of the three-year catch-up provision agreement form.

(3) In this subsection, the term "normal retirement age" for any participant means a range of ages:

(A) beginning with the earliest age at which a person may retire under the participant's basic pension plan:

(i) without an actuarial or similar reduction in retirement benefits; and

(ii) without the state's consent for the retirement; and

(B) ending at age 70.5.

(C) A participant who is a police officer or firefighter (defined in Code §415(b)), may designate a normal retirement age that is earlier than that described above, but in any event may not be earlier than age 40.

(4) If a participant works beyond age 70.5, the normal retirement age for the participant is the age designated by the participant, which, in this instance, may not be later than the participant's separation from service.

(5) For any or all of the last three full taxable years ending before the taxable year in which a participant attains normal retirement age, the maximum amount that the participant may defer for each tax year is the lesser of:

(A) twice the annual §457(g) deferral limit as adjusted, or

(B) the sum of:

(i) the normal maximum amount of deferrals for the current year plus each prior calendar year beginning after December 31, 2001, during which the participant was an employee under the plan, minus the aggregate amount of compensation that the participant deferred under the plan during such years, plus

(ii) the normal maximum amount of deferrals that the participant did not use in prior tax years commencing December 31, 1978 and before January 1, 2002, provided the participant was eligible to participate in the plan, minus the aggregate contributions to pre-2002 coordination plans during those years.

(6) The participant's employing agency will calculate and monitor all three-year catch-up limits and furnish the plan administrator with the applicable three-year catch-up forms. If a participant makes deferrals in excess of the participant's three-year catch-up limit, the following actions will be taken.

(A) Upon notification by the participant's agency, the prior plan vendor or TPA will return to the participant's agency, the amount of deferrals in excess of the three-year catch-up limit without any reduction for fees or other charges.

(B) Upon receipt of the funds, the participant's agency will reimburse the participant through its payroll system.

(7) This subsection applies only if the participant has not previously used the three-year catch-up exception with respect to a different normal retirement age under the plan or another deferred compensation plan governed by the Code §457.

(8) If a participant makes deferrals in excess of the normal plan limits under the three-year catch-up provision during or after the calendar year in which the participant reaches normal retirement age, the following actions will be taken.

(A) Upon notification by the participant's state agency, the prior plan vendor or TPA will return to the participant's state agency, the amount of deferrals in excess of the normal plan limits, that is, any amount exceeding the maximum amount allowed by the Internal Revenue Service [~~the lesser of $15,500~~] (as adjusted in accordance with Code §457(e)(15) or 100% of a participant's includible compensation) without any reduction for fees or other charges.

(B) Upon receipt of the funds, the participant's state agency will reimburse the participant through its payroll system.

(9) Over age 50 catch-up. A participant age 50 or older during any calendar year shall be eligible to make additional pre-tax contributions in accordance with Code §414(v) applicable to 457 plans, in excess of normal deferral amounts. A participant may make an additional contribution over and above the applicable deferral limit. The additional contribution is $5,000 for 2006. After 2006, the amount of the "Over age 50 and over catch-up" will be indexed in $500 increments based upon cost-of-living adjustments. A participant who elects to defer contributions under the normal three-year catch-up provisions may not also defer under the special Over age 50 catch-up and Code §414(v) and §457.

(10) Special post severance compensation under Code §415 effective January 1, 2007. A participant may elect to defer compensation paid within 2 1/2 months following separation from service in accordance with Code §415. Types of compensation include:

(A) accumulated bona fide sick pay, vacation pay, back pay or other leave, but only if the participant would have been able to use the leave if employment had continued;

(B) payments for commissions, bonuses, overtime and shift differential pay, but only if these would have been paid and are regular compensation for services rendered;

(C) compensation paid to participants who are permanently and totally disabled; and

(D) compensation relating to qualified military or other service (Reg. 1.457-4(d)(1), Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), Code §414(u) and the Pension Protection Act of 2006).

(i) Changes before a participant becomes entitled to a distribution.

(1) A participant may change the amount of deferral at any time.

(2) A participant must execute a change agreement for the prior 457 Plan funds and file the agreement with the participant's benefits coordinator [~~agency coordinator~~] when the participant:

(A) initiates a transfer;

(B) changes the participant's primary or secondary beneficiary, or both; or

(C) performs a combination of the items specified in subparagraphs (A) or (B) of this paragraph.

(3) Upon receipt of a participation agreement or change agreement, the benefits coordinator [~~an agency coordinator~~] shall review the agreement to determine whether it complies with the sections in this chapter.

(A) With a participant's enrollment, the benefits coordinator [~~agency coordinator~~] shall take the action necessary for payroll initiation.

(B) If a change agreement complies, the benefits coordinator [~~agency coordinator~~] shall send the agreement to the plan administrator.

(4) This paragraph applies to changes of beneficiaries, changes of the prior plan vendor or qualified investment product that receives a participant's deferrals, and changes to the amount a participant defers per pay period. An executed change agreement or participation agreement is effective beginning with the month following the month in which the benefits coordinator [~~agency coordinator~~] receives the agreement from the participant.

(5) This paragraph applies to transfers. An executed change agreement is effective on the date that the transfer procedures specified in §87.15 of this title (relating to Transfers) have been completed.

(j) Conflict in beneficiary designations. The designation of a primary or secondary beneficiary, or both, in a beneficiary designation form, participation agreement, change agreement, or distribution agreement prevails over a conflicting designation in any other document.

(k) A beneficiary designation that names a former spouse is invalid unless the designation is completed after the date of divorce and received by the plan administrator.

(l) Paid leave of absence. Deferrals may continue during a participant's paid leave of absence, to the extent that compensation continues.

(m) Unpaid leave of absence. If a participant separates from service or takes a leave of absence from the state because of service in the military and does not receive a distribution of his or her account balances, the Plans will allow suspension of loan repayments until after the conclusion of the period of military service.

(n) Military service. Participants on a leave of absence due to qualified military service under Code §414(u) may elect to make additional annual deferrals upon resumption of employment with the state equal to the maximum annual deferrals that the participant could have elected during that period if employment had continued (at the same level of compensation) without the interruption or leave, reduced by the annual deferrals, if any. This right applies for five years following the resumption of employment (or if sooner, for a period equal to three times the period of the interruption or leave). To qualify for USERRA, final USERRA regulations (January 18, 2006) benefits and the Pension Protection Act of 2006, the employee must return to employment with the original employer within certain specified timelines based on the length of his or her service. If less than 31 days, the employee must report to work no later than the beginning of the first full work period on the first full calendar day following discharge, allowing reasonable time required to return home safely and an eight (8) hour rest period. If more than 30 days but less than 181 days, the employee must return to employment no later than 14 days following discharge. If more than 180 days, the employee must return to employment no later than 90 days following discharge. A serviceman called up for action between September 11, 2001 and December 31, 2007 for more than 179 days may take the later of two years after the end of active service to make up annual contributions, distributions or payback loans. A tax refund or credit may be allowed if filed before the close of such period.

(o) Disability. A disabled participant may elect to defer compensation during any portion of the period of his or her disability to the extent that he or she has actual compensation (not imputed compensation and not disability benefits) from which to make contributions to the plan and has not had a separation from employment.

(p) Termination and resumption of deferrals.

(1) An employee may voluntarily terminate additional deferrals to the prior plan by completing a participation agreement or by contacting his or her benefits coordinator [~~agency coordinator~~].

(2) An employee who returns to active service after a separation from service must enroll in the revised plan before deferrals may resume.

(q) Ownership of deferrals and investment income.

(1) Until December 31, 1998, a participant's deferrals and investment income are the property of the state of Texas until the deferrals and investment income are actually distributed to the employee.

(2) Effective January 1, 1999, in accordance with Chapter 609, Texas Government Code and Code §457(g), all amounts currently and hereafter held under the plan, including deferrals and investment income, shall be held in trust by the Board of Trustees for the exclusive benefit of participants and their beneficiaries and may not be used for or diverted to any other purpose, except to defray the reasonable expenses of administering the plan. In its sole discretion, the Board of Trustees may cause plan assets to be held in one or more custodial accounts or annuity contracts that meet the requirements of Code §457(g), and §401(f). In addition, effective January 1, 1999, the Board of Trustees does hereby irrevocably renounce, on behalf of the state of Texas and participating state agencies, any claim or right which it may have retained to use amounts held under the plan for its own benefit or for the benefit of its creditors and does hereby irrevocably transfer and assign all plan assets under its control to the Board of Trustees in its capacity as the trustee of the trust created hereunder. It shall be impossible, prior to the satisfaction of all liabilities with respect to participants and their beneficiaries, for any part of the assets and income of the trust fund to be used for, or diverted to, purposes other than for the exclusive benefit of participants and their beneficiaries. Adoption of this rule shall constitute notice to prior plan vendors holding assets under the plan to change their records effective January 1, 1999, to reflect that assets are held in trust by the Board of Trustees for the exclusive benefit of the participants and beneficiaries. Failure of a vendor to change its records on a timely basis may result in the expulsion of the vendor from the plan.

(r) Market risk and related matters.

(1) The plan administrator, the trustee, an employing state agency, or an employee of the preceding are not liable to a participant if all or part of the participant's deferrals and investment income are diminished in value or lost because of:

(A) market conditions;

(B) the failure, insolvency, or bankruptcy of an investment provider; or

(C) the plan administrator's initiation of a transfer or investment of deferrals in accordance with the sections in this chapter.

(2) A participant is solely responsible for monitoring his or her own investments and being knowledgeable about:

(A) the financial status and stability of the investment provider in which the participant's deferrals and investment income are invested;

(B) market conditions;

(C) the resulting cost of making a transfer or distribution from a qualified investment product;

(D) the amount of the participant's deferrals and investment income that are invested in an investment provider's qualified investment products;

(E) the riskiness of a qualified investment product; and

(F) the federal tax advantages and consequences of participating in the plan and receiving distributions of deferrals and investment income.

(s) Alienation of deferrals and investment income. A participant's deferrals and investment income may not be:

(1) assigned or conveyed;

(2) pledged as collateral or other security for a loan;

(3) attached, garnished, or subjected to execution; or

(4) conveyed by operation of law in the event of the participant's bankruptcy, or insolvency.

§87.7. Prior Plan Vendor Participation.

(a) Prohibited activities. A prior plan vendor may not solicit business from employees or participants or otherwise participate in the plan until the prior plan vendor and the plan administrator have signed a vendor contract. No applications have been or will be accepted by the plan administrator for new prior plan vendors since January 1, 2000. For purposes of this Chapter, any language referring to prior plan vendor qualifications, eligibility or participation requirements remains necessary in order for the plan administrator to continue to assess whether the prior plan vendor remains an eligible vendor.

(b) Eligibility requirements of a prior plan vendor.

(1) Banks. The plan administrator shall disapprove a bank's application to become a prior plan vendor if:

(A) the bank is not domiciled in the State of Texas;

(B) the FDIC does not insure deposits with the bank; or

(C) the bank is either not well-capitalized or is adequately capitalized but has not obtained a waiver to accept brokered deposits as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991, Public Law 102-242, 105 Statute 2236, the Deficit Reduction Act of 2005 (P.L.109-171), enacted on February 8, 2006, and the related regulations.

(2) Credit unions. The plan administrator shall disapprove a credit union's application to become a prior plan vendor if:

(A) The credit union is not authorized to do business in the State of Texas under either the Texas Credit Union Act (Texas Civil Statutes, Article 2461-1.01 et seq.) or the Federal Credit Union Act (12 United States Code, §1751);

(B) the National Credit Union Administration and the National Credit Union Share Insurance Fund does not insure deposits with the credit union; or

(C) the credit union does not agree to collateralize deferrals and investment income to the extent that:

(i) they exceed the amounts insured by the National Credit Union Administration and National Credit Union Share Insurance Fund; and

(ii) collateralization is required by the sections in this chapter.

(3) Insurance companies.

(A) Upon receiving an application from an insurance company to become a prior plan vendor, the plan administrator shall file a written request with the Texas Department of Insurance for information about the company.

(B) The plan administrator shall disapprove an insurance company's application to become a prior plan vendor if the Texas Department of Insurance notifies the plan administrator that the insurance company:

(i) does not have a certificate of authority to transact business in the State of Texas;

(ii) is not a member of the Life, Accident, Health, and Hospital Service Insurance Guaranty Association; or

(iii) is an impaired or insolvent insurer as defined in the Life, Accident, Health, and Hospital Service Insurance Guaranty Association Act (Insurance Code, Article 21.28-D).

(4) Savings and loan associations. The plan administrator shall disapprove a savings and loan association's application to become a prior plan vendor if:

(A) the savings and loan association is a foreign association without a certificate of authority to transact business in the State of Texas as defined and required by the Texas Savings and Loan Act (Texas Civil Statutes, Article 852a);

(B) the FDIC does not insure deposits with the savings and loan association; or

(C) the savings and loan association is either not well-capitalized or is adequately capitalized but has not obtained a waiver to accept brokered deposits as defined in the Federal Deposit Insurance Corporation Improvement Act of 1991, Public Law 102-242, 105 Statute 2236, the Deficit Reduction Act of 2005 (P.L.109-171), enacted on February 8, 2006, and the related regulations.

(5) Prior plan vendors of mutual funds. The plan administrator shall disapprove a vendor's application to become a prior plan vendor if the vendor proposes to offer a mutual fund as a qualified investment product and the mutual fund is not:

(A) listed on the American Stock Exchange, Boston Stock Exchange, Midwest Stock Exchange, New York Stock Exchange, or a stock exchange approved by the securities commissioner of the State Securities Board in accordance with the Securities Act (Texas Civil Statutes, Article 581-1 et seq.);

(B) designated or approved for designation on notice of issuance on the National Association of Securities Dealers Automated Quotation National Market System; or

(C) registered with the securities commissioner.

(c) Procedure for approving a prior plan vendor.

(1) The home office of each prior plan vendor seeking participation in the plan must request an application package from the plan administrator. The plan administrator shall ensure that the application package contains a list of documents and other items that must be submitted to the plan administrator with the application.

(2) The plan administrator may not approve a prior plan vendor for participation in the plan unless:

(A) the plan administrator and the vendor sign a product contract concerning at least one of the vendor's investment products;

(B) the vendor has a federal employers identification number; and

(C) the vendor agrees to accept both transfers to and the investment of deferrals in its qualified investment products.

(3) As a prerequisite to approving an application, the plan administrator shall require a prior plan vendor to:

(A) execute an Employer Appointment of Agent form so that the vendor may file reports directly with the Internal Revenue Service; and

(B) prove to the plan administrator's satisfaction that the vendor is capable of filing reports as required by §87.19 of this title (relating to reporting and recordkeeping by prior plan vendors).

(4) If the plan administrator approves an application, the plan administrator shall sign and send to the prior plan vendor a vendor contract that complies with the sections in this chapter and applicable law.

(d) Contacts.

(1) In the application package, a prior plan vendor shall designate one individual who will be:

(A) receiving deferrals and investment income;

(B) acting as a prior plan vendor representative or agent and accepting Plan funds in accordance with instructions on Plan forms;

(C) answering questions about the balances of deferrals and investment income; and

(D) serving as liaison between the plan administrator and vendor management concerning matters of administration and vendor reporting.

(2) In addition to the requirements of paragraph (1) of this subsection, an out-of-state prior plan vendor shall designate a responsible and knowledgeable individual in Texas who the plan administrator may contact for information about the vendor's activities in the plan.

(3) Each prior plan vendor shall update the designations and information required by this subsection no later than the 30th day after a change.

(4) The designations and updates required by this subsection must contain the names, addresses, and business telephone numbers of the individuals designated.

(e) Change of name or legal status by a prior plan vendor.

(1) If a prior plan vendor's name or legal status changes through merger, sale, dissolution, or any other means, the prior plan vendor must notify the plan administrator in writing no later than the 30th day after the change. The notice must contain a detailed description of the transaction that causes the change.

(2) If a change in legal status results in the prior plan vendor's participation in the plan being conducted by a different legal entity, the new entity must notify the plan administrator no later than the 90th day after the change for approval as a qualified vendor before the entity may participate in the plan. If the new entity is not approved, participant funds would then be transferred to the revised plan. Transfers under this paragraph shall be made in accordance with §87.15(c) and (d) of this title (relating to Transfers) and shall not result in a fee or penalty being charged against the participant's account. Provided, however, that the plan administrator may, in its sole discretion, choose not to apply this paragraph, if it determines that it would be in the best interests of the plan and participants.

(3) If a change in legal status results in a prior plan vendor's participation in the plan being conducted by a different legal entity that is also a prior plan vendor, participant funds may be transferred to that prior plan vendor, who then becomes responsible for the reporting requirements of the transferred funds.

(f) Voluntary termination of participation in the plan.

(1) A prior plan vendor may voluntarily terminate its participation in the plan after notifying, in writing, the plan administrator and all participants whose deferrals and investment income are invested in the vendor's qualified investment products. The prior plan vendor must ensure that the plan administrator and the participants receive the written notice no later than the 60th day before the effective date of the termination.

(2) A prior plan vendor may establish the effective date of its termination from the plan. The prior plan vendor must clearly state the effective date in the written notice required by paragraph (1) of this subsection.

(3) Notwithstanding paragraph (2) of this subsection, if the terminating prior plan vendor sponsors qualified investment products that have specific terms, such as a three-year certificate of deposit or a 30-day passbook account, the effective date of the prior plan vendor's termination may not be before the terms of all those products have expired for every participant unless approved by the plan administrator, the prior plan vendor must hold the participants, the plan and the plan administrator harmless from any fees or penalties that may be applicable in connection with such premature termination.

(4) After receiving notice of termination, the plan administrator shall request each affected participant to submit a prior funds transfer form for the disposition of his or her deferrals and investment income. For each participant from whom the plan administrator has not received a prior funds transfer form by the effective date of the termination, the plan administrator shall initiate a transfer of all deferrals and investment income from the terminating vendor's qualified investment products to the revised plan.

(5) When a prior plan vendor voluntarily terminates its participation in the plan, the vendor may not charge or permit to be charged a fee or penalty to participants, the plan or plan administrator for the transfers made after the notice of termination.

(6) When a prior plan vendor that is an insurance company voluntarily terminates its participation in the plan, this paragraph applies in addition to the preceding paragraphs of this subsection.

(A) In this paragraph, the term "terminated life insurance product" means a life insurance product that is no longer a qualified investment product because the life insurance company offering the product has voluntarily terminated the company's participation in the plan.

(B) A participant whose deferrals and investment income have been invested in a terminated life insurance product may continue life insurance coverage with the insurance company offering the product.

(C) An insurance company that voluntarily terminates its participation in the plan must offer continuing life insurance coverage to each participant whose deferrals and investment income were invested in a terminated life insurance product offered by the company. The insurance company must offer continuing coverage in a life insurance product that is comparable to the terminated life insurance product in which the participant's deferrals and investment income were invested.

(D) The premiums for continuing life insurance coverage must be paid by the participant directly to the insurance company and may not be paid with deferrals or investment income.

(E) A participant may exercise the right to continue life insurance coverage only if the participant mails to the insurance company written notice of the participant's intention to continue the coverage. The written notice must be postmarked no later than the 60th day after the effective date of the company's termination of participation in the plan. However, an insurance company may increase the 60-day time limit for a participant or for all participants.

(F) When a participant elects to continue life insurance coverage, the insurance company with which coverage is continuing may not:

(i) refuse to continue the life insurance;

(ii) require a postponement or an interruption in coverage for any length of time;

(iii) require the participant to provide evidence of insurability;

(iv) require the participant to apply for coverage;

(v) require the participant to select a different life insurance product from the product in which the participant's deferrals and investment income were invested before the company's participation in the plan terminated;

(vi) discriminate in any manner against the participant because of the company's termination of its participation in the plan;

(vii) treat the participant differently than the company would treat a non-participant with the same life insurance coverage; or

(viii) increase the premiums charged to the participant solely because the company terminated its participation in the plan or because the participant elected to continue coverage.

(G) A prior plan vendor must inform the participant in the written notice required by paragraph (1) of this subsection that the participant has the rights specified in this paragraph. A prior plan vendor must send a copy of this notice to the plan administrator.

(H) If a prior plan vendor does not comply with subparagraph (G) of this paragraph, then a participant may exercise the right to continue insurance up to the 120th day after the prior plan vendor actually mails written notice to the participant, containing a full explanation of the participant's rights.

(g) Inactive prior plan vendors. The plan administrator shall terminate the participation in the plan of an inactive prior plan vendor. See §87.1 of this title (relating to Definitions).

(h) Refusal to accept additional deferrals.

(1) A prior plan vendor may not refuse to accept additional deferrals to any or all its qualified investment products, even if the refusal would be temporary.

(2) If a prior plan vendor refuses to accept additional deferrals to all its qualified investment products, the plan administrator shall terminate the prior plan vendor's participation in the plan.

(3) If a prior plan vendor refuses to accept additional deferrals to fewer than all its qualified investment products, the plan administrator shall terminate the participation in the plan of the qualified investment products that are not accepting additional deferrals.

(i) Collateralization by banks.

(1) This subsection applies only to prior plan vendors that are banks.

(2) In this subsection, the term "deferred compensation information" means the cumulative total of all deferrals on deposit with the prior plan vendor as of the end of the previous month.

(3) At the plan administrator's discretion, the plan administrator may require a prior plan vendor to report deferred compensation information and additional information to the data collection center no later than 1:00 p.m., central time, on a call-in day that the plan administrator considers necessary to evaluate the collateralization requirement under this subsection.

(4) Once each quarter, a prior plan vendor shall furnish to the plan administrator the following information certified by its chief financial officer:

(A) its current capital category as defined in the Prompt Corrective Action regulations, 12 Code of Federal Regulations, Part 325, Subpart B, i.e., well capitalized, adequately capitalized, etc.;

(B) its total capital to risk-weighted assets ratio as defined in the applicable FDIC regulations;

(C) its Tier 1 capital to total book assets ratio as defined in the applicable FDIC regulations;

(D) its Tier 1 capital to risk-weighted ratio;

(E) its most recent call report and/or other financial report that can be used to substantiate subparagraphs (A) - (D) of this paragraph; and

(F) if applicable, evidence of a waiver from the FDIC that permits the prior plan vendor to accept brokered deposits.

(5) A prior plan vendor shall immediately notify the plan administrator if the prior plan vendor's capital category changes before its next call report or if its waiver from the FDIC with regard to brokered deposits expires, is revoked, or materially changes.

(6) A prior plan vendor must collateralize deferrals and investment income as required by the plan administrator. If a monthly report indicates that a prior plan vendor will lose or has lost FDIC pass-through insurance, the prior plan vendor shall immediately pledge additional collateral and comply with the directives of the plan administrator. The plan administrator may suspend or expel an under-collateralized prior plan vendor in accordance with §87.21(a)(8) of this title (relating to Remedies).

(7) A prior plan vendor may not require a participant to withdraw some or all of the participant's deferrals and investment income so that the prior plan vendor may avoid the collateralization requirements imposed by the plan administrator. A prior plan vendor may not establish a maximum amount of deferrals that a participant may invest in the vendor's qualified investment products.

(8) Notwithstanding a prior plan vendor's reinvestment of deferrals and investment income in investment products offered by the prior plan vendor's trust department or by other prior plan vendors, the deferrals and investment income are deemed invested in the vendor's qualified investment products for the purpose of this subsection.

(9) The plan administrator, in its discretion, may immediately transfer under-collateralized funds plus any amount reasonably necessary to prevent future under-collateralization. The transfer shall be carried out in accordance with the procedures set forth in §87.15 of this title. The prior plan vendor may not charge the participant a fee or penalty due to a withdrawal of under-collateralized funds.

(j) Collateralization by savings and loan associations.

(1) This subsection applies only to a prior plan vendor that is a savings and loan association.

(2) In this subsection, the term "deferred compensation information" means:

(A) the amount by which the balance of each account as of the end of the previous month exceeds the amount insured by the FDIC; and

(B) the number of accounts whose balances exceed the amount insured by the FDIC.

(3) At the plan administrator's discretion, the plan administrator may require a prior plan vendor to report deferred compensation information and additional information to the data collection center no later than 1 p.m., central time, on a call-in day that the plan administrator considers necessary to evaluate the collateralization requirement under this subsection.

(4) Once each quarter, a prior plan vendor shall furnish to the plan administrator the following information certified by its chief financial officer:

(A) its current capital category as defined in the Prompt Corrective Action regulations, 12 Code of Federal Regulations, Part 325, Subpart B, i.e., well-capitalized, adequately capitalized, etc.;

(B) its total capital to risk-weighted assets ratio as defined in the applicable FDIC regulations;

(C) its Tier 1 capital to total book assets ratio as defined in the applicable FDIC regulations;

(D) its Tier 1 capital to risk-weighted ratio;

(E) its most recent call report and/or other financial report that can be used to substantiate subparagraphs (A) - (D) of this paragraph; and

(F) if applicable, evidence of a waiver from the FDIC that permits the prior plan vendor to accept brokered deposits.

(5) A prior plan vendor shall immediately notify the plan administrator if the prior plan vendor's capital category changes before its next call report or if its waiver from the FDIC with regard to brokered deposits expires, is revoked, or materially changes.

(6) A prior plan vendor must collateralize deferrals and investment income as required by the plan administrator. If a monthly report indicates that a prior plan vendor will lose or has lost FDIC pass-through insurance, the prior plan vendor shall immediately pledge additional collateral and comply with the directives of the plan administrator. The plan administrator may suspend or expel an under-collateralized prior plan vendor in accordance with §87.21(a)(8) of this title (relating to Remedies).

(7) A prior plan vendor may not require a participant to withdraw some or all of the participant's deferrals and investment income so that the prior plan vendor may avoid the collateralization requirements imposed by the plan administrator. A prior plan vendor may not establish a maximum amount of deferrals that a participant may invest in the vendor's qualified investment products.

(8) Notwithstanding a prior plan vendor's reinvestment of deferrals and investment income in investment products offered by the prior plan vendor's trust department or by other vendors, the deferrals and investment income are deemed invested in the vendor's qualified investment products for the purpose of this subsection.

(9) The plan administrator, in its discretion, may immediately transfer under-collateralized funds plus any amount reasonably necessary to prevent future under-collateralization. The transfer shall be carried out in accordance with the procedures set forth in §87.15 of this title. The prior plan vendor may not charge the participant a fee or penalty due to a withdrawal of under-collateralized funds.

(k) Limits on account balances in credit unions.

(1) This subsection applies only to a qualified vendor that is a credit union.

(2) A prior plan vendor may not accept deferrals to an account if the deferrals would cause the balance of the account to exceed $250,000 (as amended), the amount insured by the National Credit

Union Administration and National Credit Union Share Insurance Fund unless the vendor or participant has complied with paragraph (6) of this subsection.

(3) In this subsection, the term "deferred compensation information" means:

(A) the amount by which the balance of each account as of the end of the previous month exceeds $250,000 (as amended);

(B) the qualified investment product in which the participant's future deferrals will be invested, in lieu of investing them in the credit union's qualified investment products.

(C) the total amount by which the balances of all reported accounts exceed $250,000 (as amended).

(4) Once each month, a prior plan vendor shall report deferred compensation information to the plan administrator no later than 1 p.m., central time, on a call-in day. If a prior plan vendor has no accounts that exceed $250,000 (as amended), the prior plan vendor must report that fact to the plan administrator.

(5) The plan administrator shall notify the benefits coordinator [~~agency coordinator~~] for each participant whose account exceeds $250,000 (as amended). Upon receiving the notice, the benefits coordinator [~~agency coordinator~~] shall request the participant to specify in a change agreement:

(A) the qualified investment product to which at least the amount in the account in excess of $250,000 (as amended) will be moved; and

(B) the qualified investment product in which the participant's future deferrals will be invested, in lieu of investing them in the credit union's qualified investment products.

(6) If a participant does not want funds in excess of $250,000 (as amended) transferred from the credit union, the participant may keep funds at the credit union if:

(A) the credit union will pledge collateral for all funds in excess of $250,000 (as amended) in accordance with plan administrator procedures; or

(B) the participant acknowledges and accepts the liability of uninsured funds through a signed statement on forms furnished by the plan administrator.

(7) If a participant does not submit a change agreement to the benefits coordinator [~~agency coordinator~~] immediately after receiving a request from the participant's benefits coordinator [~~agency coordinator~~] in accordance with paragraph (5) of this subsection and if paragraph (6) of this subsection is not complied with, the benefits coordinator [~~agency coordinator~~] shall notify the plan administrator. Upon receiving the notification, the plan administrator shall:

(A) initiate a transfer of the amount in the account in excess of $250,000 (as amended) in accordance with §87.15 of this title; and

(B) prohibit the participant from deferring additional amounts to the prior plan vendor's qualified investment products.

(l) Audits. The plan administrator may audit or cause an audit to be performed of a current or former prior plan vendor related to the vendor's participation in the plan.

(m) The plan administrator may expel a prior plan vendor that fails to maintain all requirements needed to become a prior plan vendor. Such vendor may not charge or permit to be charged a fee or penalty to participants, the plan or plan administrator for the transfers made due to expulsion.

§87.9. Investment Products.

(a) Prohibited activity. A prior plan vendor or prior plan vendor representative may not solicit investments in an investment product after August 31, 2000.

(b) New qualified investment products.

(1) Notwithstanding anything to the contrary in the sections in this chapter, other than §87.31 and paragraph (2) of this subsection, the plan administrator may not:

(A) approve an investment product as a qualified investment product; or

(B) issue a product approval notice.

(2) Paragraph (1)(A) and (B) of this subsection do not apply to a qualified investment product that the plan administrator approved for participation in the plan before May 7, 1990. If the plan administrator has not executed a product contract with a prior plan vendor that is sponsoring a qualified investment product, the plan administrator and the prior plan vendor shall execute a product contract no later than the 90th day after May 7, 1990. If a product contract is not executed, the plan administrator shall terminate the qualified investment product's participation in the plan.

(c) Eligibility of investment products. The investment products that are eligible for approval as qualified investment products are:

(1) fixed and variable rate annuities;

(2) life insurance (except that new life policies may not be offered in the plan by any vendor after December 31, 1992);

(3) stable value account;

(4) self-directed brokerage account;

(5) target date retirement funds;

(6) [~~(5)~~] mutual funds; and

(7) [~~(6)~~] money market accounts, certificates of deposit, share certificates or passbook savings accounts offered by a bank, savings and loan association, or credit union.

(d) Review of investment products.

(1) General requirements. The plan administrator may not issue a product approval notice concerning an investment product unless:

(A) the prior plan vendor offering the investment product submits to the plan administrator the documentation and information the plan administrator requires;

(B) the prior plan vendor offering the product agrees to accept both transfers to and the investment of deferrals in its product;

(C) the plan administrator finds that the advertising material for the product, if any, complies with the sections in this chapter;

(D) the plan administrator determines that the disclosure form for the product complies with the sections in this chapter;

(E) the plan administrator finds that the investment product has a guaranteed minimum interest rate if the product has a variable interest rate;

(F) the plan administrator determines that the investment product complies with §87.7(b)(5) of this title (relating to prior plan vendor participation), if the product is a mutual fund;

(G) the plan administrator concludes that the inclusion of the investment product in the plan would be in the best interests of the plan; and

(H) the plan administrator ascertains that the vendor has obtained the necessary approvals from the appropriate regulatory agencies.

(2) Additional requirements for approving investment products offered by insurance companies. Before the plan administrator may sign a product contract, the plan administrator must:

(A) obtain written confirmation from the Texas Department of Insurance that the investment product has been approved for sale in Texas;

(B) determine that the amount of the investment product's premiums, payments, and benefits are not calculated with regard to the sex of the person insured or of the recipient of the benefits; and

(C) determine that the investment product does not insure anyone other than a participant.

(e) Product contracts.

(1) The plan administrator may not sign a product contract with a prior plan vendor unless the plan administrator has already issued a product approval notice concerning the investment product that will be covered by the product contract.

(2) The plan administrator may not sign a product contract that does not comply with the sections in this chapter and applicable law.

(3) The plan administrator may, in its sole discretion, permit a prior plan vendor to replace, substitute, or merge an existing plan product with another product, if procedures established by the plan administrator are met.

(f) Withdrawal of a qualified investment product from the plan.

(1) A prior plan vendor may withdraw a qualified investment product from the plan after notifying, in writing, the plan administrator and all participants whose deferrals and investment income are invested in the qualified investment product. The prior plan vendor must ensure that the plan administrator and the participants receive the written notice no later than the 60th day before the effective date of the withdrawal.

(2) A prior plan vendor may establish the effective date of a withdrawal of the vendor's qualified investment product. The prior plan vendor must clearly state the effective date in the written notice required by paragraph (1) of this subsection.

(3) Notwithstanding paragraph (2) of this subsection, if a qualified investment product has a specific term, such as a three-year certificate of deposit or a 30-day passbook account, the effective date of the withdrawal may not be before the term of the product has expired for every participant unless approved by the plan administrator, the prior plan vendor must hold the participants, the plan and plan administrator harmless from any fees or penalties that may be applicable in connection with such premature termination or withdrawal. The term of a product will be deemed expired if all participants have transferred their funds to another qualified investment product.

(4) After receiving notice of withdrawal, the plan administrator shall contact each affected participant to submit a prior funds transfer form for the disposition of his or her deferrals and investment income. For each participant from whom the plan administrator has not received a prior funds transfer form by the effective date of the withdrawal, the plan administrator shall initiate a transfer of all deferrals and investment income from the qualified investment product being withdrawn to the default fund in the revised plan.

(5) When a prior plan vendor withdraws a qualified investment product from the plan, the vendor may not charge a fee or permit to be charged or penalty to participants, the plan or plan administrator for transfers made after the notice of withdrawal.

(6) When a prior plan vendor that is an insurance company with existing life policies in the plan withdraws a life insurance product from the plan, this paragraph applies in addition to the preceding paragraphs of this subsection.

(A) In this paragraph, the term "withdrawn life insurance product" means a life insurance product that is no longer a qualified investment product because the life insurance company offering the product has withdrawn the product from the plan.

(B) A participant whose deferrals and investment income have been invested in a withdrawn life insurance product may continue life insurance coverage with the insurance company offering the product.

(C) If the insurance company has a life insurance product remaining in the plan that is comparable to the withdrawn life insurance product, this paragraph applies. The insurance company shall offer continuing coverage in:

(i) a qualified investment product that is comparable to the withdrawn life insurance product; and

(ii) a life insurance product that is not a qualified investment product but is comparable to the withdrawn life insurance product.

(D) If the insurance company does not have a life insurance product remaining in the plan that is comparable to the withdrawn life insurance product, this paragraph applies. The company must offer continuing life insurance coverage to each participant whose deferrals and investment income were invested in the withdrawn life insurance product. The insurance company shall offer continuing coverage in a life insurance product that is comparable to the withdrawn life insurance product.

(E) If a participant continues life insurance coverage in a life insurance product that is not a qualified investment product, the participant must pay the premiums for the coverage directly to the insurance company. The premiums may not be paid with deferrals or investment income.

(F) A participant may exercise the participant's right to continue life insurance coverage only if the participant mails to the insurance company written notice of intention to continue the coverage. The written notice must be postmarked no later than the 60th day after the effective date of the withdrawal of the life insurance product from the plan. However, an insurance company may increase the 60-day time limit for a participant or for all participants.

(G) When a participant elects to continue life insurance coverage, the insurance company with which the coverage is continuing may not:

(i) refuse to continue the life insurance;

(ii) require a postponement or an interruption in coverage for any length of time;

(iii) require the participant to provide evidence of insurability;

(iv) require the participant to apply for coverage;

(v) require the participant to select a different life insurance product from the withdrawn life insurance product;

(vi) discriminate in any manner against the participant because of the company's withdrawal of the product;

(vii) treat the participant differently than the company would treat a non-participant with the same life insurance coverage; or

(viii) increase the premiums charged to the participant solely because the company withdrew a life insurance product from the plan or because the participant elected to continue coverage.

(H) A prior plan vendor must inform the participant in the written notice required by paragraph (1) of this subsection that the participant has the rights specified in this paragraph.

(I) If a prior plan vendor does not comply with subparagraph (H) of this paragraph, then a participant may exercise the participant's right to continue insurance up to the 120th day after the prior plan vendor actually mails written notice to the participant containing a full explanation of the participant's rights.

§87.17. Distributions.

(a) In general. Upon request, the plan administrator or TPA shall authorize the distribution of a participant's deferrals and investment income in accordance with the applicable distribution agreement so long as:

(1) the participant has attained age 70.5;

(2) the participant has died;

(3) the participant's employment with the state of Texas has terminated other than through death;

(4) the participant has complied with subsection (l) of this section relating to the one-time election of distribution that does not exceed the dollar limit under Code §457(e)(9);

(5) the participant elects to have any portion of his or her account balance transferred to a tax-qualified governmental defined benefit plan (as defined in §414(d) of the Code) in the same state or another state that provides for the acceptance of plan-to-plan transfers with respect to the participant; or

(6) the participant elects a transfer to be made if the transfer is either for the purchase of permissible service credit (as defined in §415(n)(3) of the Code and as amended by the Pension Protection Act of 2006) under the receiving governmental defined benefit plan, or if the transfer is for a repayment to which §415 of the Code does not apply by reason of §415(k)(3) of the Code.

(b) Definitions.

(1) In subsections (m) - (o) of this section, the term "participant's deferrals and investment income" means the cash value of the participant's deferrals and investment income after considering all surrender charges, costs of insurance, forfeitures, and other similar charges.

(2) In this section, a beneficiary or secondary beneficiary "survives" another person only if the beneficiary or secondary beneficiary is alive on the day after the person's death.

(c) Content of a distribution agreement.

(1) A distribution agreement must contain but shall not be limited to:

(A) identifying information concerning the participant, including the date of birth and social security number of the participant;

(B) the name of the prior plan vendor or revised plan vendor covered by the agreement;

(C) the type of qualified investment product from which distributions will be made, including policy/certificate/or account number;

(D) the date on which the participant separated from service, attained age 70.5, or died, whichever is applicable;

(E) the beginning date of the distributions;

(F) the type of distribution;

(G) the amount to be distributed during each time period or the method for calculating the amount to be distributed during each time period; and

(H) beneficiary information, including date of birth(s) and social security number(s).

(2) The person filing the distribution agreement must attach a properly executed Form W-4P to the agreement.

(3) A distribution agreement must be consistent with the distribution options available for the qualified investment product covered by the agreement. The prior plan vendor agent/representative signature on the distribution agreement signifies that the distribution option is available and can be implemented as requested.

(d) Commencement of distributions. Notwithstanding anything in a distribution agreement:

(1) the earliest a participant or beneficiary may begin receiving a distribution is the 51st day after the occurrence that entitles the participant or beneficiary to the distribution, except this paragraph does not apply to an emergency withdrawal or a one-time election distribution; and

(2) A participant must begin receiving a distribution by the later of:

(A) April 1st of the year following the calendar year in which the participant attains age 70.5; or

(B) April 1st of the year following the year in which the participant retires or otherwise has a separation from employment.

(e) Filing of distribution agreements by participants.

(1) This subsection applies when a participant becomes entitled to a distribution because:

(A) the participant has attained age 70.5; or

(B) the participant's employment with the state of Texas has terminated other than through death.

(2) A participant must file a single distribution agreement for all qualified investment products in which the participant's deferrals are invested.

(3) Notwithstanding anything to the contrary in this subsection, a participant who has not separated from service and who has reached age 70.5 may file a distribution agreement if the participant wants to begin distributions. If distributions commence in the calendar year following the later of the calendar year in which the participant attains age 70.5 or the calendar year in which the separation from employment occurs, the distribution must be equal to the annual installment payment for the year, determined under the Uniform Lifetime Table of the Income Tax Regulations for the participant's age regarding types of distributions. This must also be paid before the end of the calendar year of commencement of distributions.

(4) Notwithstanding any other plan provision, amounts deferred by a former participant of the plan not yet payable or made available to such participant may be transferred to another eligible plan of which the former participant has become a participant, if:

(A) the plan receiving such amounts provides for its acceptance; and

(B) a participant separates from service with the participant's agency and accepts employment with another entity maintaining an eligible deferred compensation plan.

(5) A participant or a beneficiary of a participant who previously filed an irrevocable distribution election under the prior plan or under the revised plan may change that distribution election or cancel that distribution election by notifying the plan administrator. Such notification must be in writing on a distribution agreement form and received by the plan administrator at least 30 days prior to the scheduled distribution date.

(6) A participant may request a trustee-to-trustee transfer of assets from the prior plan or the revised plan to a governmental defined benefit plan in the same state or another state for the purchase of permissible service credit (as defined in the Code §414(d) and (p) and Code §415(n)(3)(A), as amended by the Pension Protection Act of 2006) under such plan or a repayment to which Code §415 does not apply by reason of subsection (k)(3) thereof. The participant may elect to have any portion of the account balance transferred to a governmental defined benefit plan.

(7) Upon receipt of a certified copy of a qualified domestic relations order, a certified copy of a judgment, decree or order (including approval of a property settlement agreement) that relates to the provision of child support, alimony payments, or the marital property rights of a spouse or former spouse, child, alternate payee, or other dependent of a participant, and same is made pursuant to the domestic relations law of any state, then the amount of the participant's account balance shall be paid in the manner and to the person or persons so directed in the domestic relations order. Such payment shall be made without regard to whether the participant is eligible for a distribution of benefits under the plan. The plan administrator or TPA shall establish reasonable procedures for determining the status of any such decree or order and for effectuating distribution pursuant to the domestic relations order. (§414(p) of the Code and §1.457-10(c) of the Income Tax Regulations)

(8) At a participant's, surviving spouse's, or beneficiary(s) request, the plan administrator may process a trustee-to-trustee transfer of an eligible rollover distribution upon receipt of appropriate instructions from the receiving plan. If a beneficiary is a non-spouse, the non-spouse may request a rollover to an inherited IRA.

(f) Minimum distributions during the life of a participant.

(1) This subsection applies to distributions to a participant during the life of the participant, notwithstanding anything to the contrary in the participant's distribution agreement.

(2) The amount distributed to the participant must be calculated so that the distributions:

(A) will be distributed over a period not exceeding the life expectancy of the participant as set forth in the Uniform Lifetime Table of the Income Tax Regulations for the participant's age on the participant's birthday for that year or the life expectancy of the participant and the participant's named beneficiary;

(B) will satisfy the minimum distribution requirements of the Code §457(d)(2), §401(a)(9), and associated statutes and regulations; and

(C) For the purpose of paragraph (2) of this subsection, life expectancies may not be recalculated annually. For any year, the participant can elect distribution of a greater amount not to exceed the amount of the remaining account balance in lieu of the amount calculated using this formula.

(3) The plan administrator shall reject a proposed distribution agreement that does not comply with paragraph (2) of this subsection. The plan administrator shall require the amendment of an existing distribution agreement that does not comply with paragraph (2) of this subsection.

(g) Review of distribution agreements by the plan administrator. The plan administrator shall review each distribution agreement received to ensure that:

(1) a distribution would be in compliance with the sections in this chapter; and

(2) the minimum distribution requirements of this section have been satisfied.

(h) Amendments of distribution agreements.

(1) Beginning date for a distribution. The beginning date for a distribution may be deferred or cancelled, and the amended distribution agreement must be received by the plan administrator no later than the 30th day before the original distribution begin date.

(2) Frequency of distribution. The frequency of a distribution may be amended if the plan administrator receives an amended distribution agreement no later than the 30th day before the next scheduled distribution.

(3) Amount of distribution. The amount to be distributed during each time period may be amended only if the plan administrator receives an amended distribution agreement no later than the 30th day before the next scheduled distribution.

(4) Beneficiaries.

(A) The primary and secondary beneficiaries named in a distribution agreement may be changed at anytime by filing a change agreement with the benefits coordinator [~~agency coordinator~~] of the state agency at which the participant was employed or by submitting a beneficiary designation form directly with the TPA, for the revised plan.

(B) Upon receipt of the change agreement, the benefits coordinator [~~agency coordinator~~] shall send a copy of the agreement to the plan administrator.

(C) The change agreement is effective upon receipt by the plan administrator.

(5) Unforeseeable emergency distribution. Notwithstanding anything to the contrary in this subsection, a distribution agreement may be amended to relieve a severe financial hardship caused by an unforeseeable emergency.

(6) Procedures for amending a distribution agreement.

(A) A participant or beneficiary who wants to amend the participant's distribution agreement must file an amended distribution agreement with the plan administrator.

(B) Upon receipt of the amended distribution agreement, the plan administrator; shall promptly review the agreement for compliance with the sections in this chapter.

(C) If the amended distribution agreement does not comply with the sections in this chapter, the agreement will be returned to the participant or beneficiary for corrections.

(D) After the plan administrator receives a signed distribution agreement, the plan administrator and the prior plan vendor or TPA covered by the agreement shall take the steps specified in subsections (h) and (j) of this section.

(7) Effective date of amended distribution agreements is no later than 30 days after the plan administrator receives the form. An amended distribution agreement is effective with the next distribution.

(i) Procedure for making distributions.

(1) Upon receiving a letter of authorization, the prior plan vendor or TPA shall issue checks payable to the participant or beneficiary and mail the checks as instructed in the letter of authorization.

(2) The plan administrator may not complete any forms provided by a prior plan vendor in connection with a distribution. A prior plan vendor may not require the plan administrator to submit periodic letters of authorization beyond the initial letter of authorization unless the plan administrator has agreed in writing. A prior plan vendor may not impose any requirements as a prerequisite to a distribution that are not specifically mentioned in the sections in this chapter.

(3) The plan administrator shall provide each prior plan vendor with the names and signatures of the individuals who are authorized to sign letters of authorization.

(4) A prior plan vendor shall confirm each letter of authorization as instructed in the letter.

(j) Unforeseeable emergency distribution.

(1) The participant must request the unforeseeable emergency withdrawal by filing a completed emergency hardship withdrawal application with the plan administrator or TPA. An emergency hardship withdrawal application must show that the prerequisites for making an unforeseeable emergency withdrawal have been fulfilled.

(2) The plan administrator shall approve the unforeseeable emergency withdrawal if the plan administrator determines, based on a representation from the participant in a form prescribed by the plan administrator or TPA, that:

(A) an unforeseeable emergency has occurred;

(B) the severe financial hardship cannot be relieved:

(i) through reimbursement or compensation by insurance or otherwise;

(ii) by liquidating the assets of the participant to the extent the liquidation of the assets would not itself cause severe financial hardship;

(iii) by cessation of deferrals under the plan;

(iv) by other distributions or nontaxable loans from the Plan or any other qualified retirement plan, or by borrowing from commercial sources on reasonable commercial terms; or

(v) through a combination of the actions specified in clauses (i) - (iii) of this subparagraph; and

(C) the unforeseeable emergency withdrawal would satisfy the federal regulations for unforeseeable emergency withdrawals under the Code §457.

(3) If the plan administrator or TPA approves an unforeseeable emergency withdrawal, the plan administrator shall determine the amount of the withdrawal. The amount may not exceed the amount reasonably needed to overcome the severe financial hardship, after considering the federal income tax liability resulting from the withdrawal.

(4) The term "unforeseeable emergency" means a severe financial hardship to a participant or participant's beneficiary caused by:

(A) a sudden and unexpected illness or accident of a participant or of a participant's dependent (as defined in the Code §457, §152(a), and the Working Families Tax Relief Act of 2004;

(B) the loss of the property of a participant or participant's beneficiary because of a casualty (including the need to rebuild a home following damage to a home not otherwise covered by homeowner's insurance, as a result of a natural disaster); or

(C) a similar extraordinary and unforeseeable circumstance arising from events beyond the control of a participant, which includes the prevention of imminent foreclosure or eviction from a participant's or beneficiary's primary residence, funeral expenses of participant's dependents (as defined in §152(a) of the Code and the Working Families Tax Relief Act of 2004), and payment of non-reimbursed medically necessary expenses, which includes non-refundable deductibles, as well as the cost of prescription drug medications.

(5) The term "unforeseeable emergency" excludes:

(A) the necessity to send a child to college;

(B) the purchase of a home;

(C) such emergency that is or may be relieved through:

(i) reimbursement or compensation from insurance or otherwise;

(ii) liquidation of the participant's assets, to the extent the liquidation would not itself cause severe financial hardship;

(iii) cessation of deferrals under the plan;

(iv) other distributions or nontaxable loans from the Plan or any other qualified retirement plan, or by borrowing from commercial sources on reasonable commercial terms; or

(v) through a combination of the actions specified in clauses (i) - (iv) of this subparagraph.

(D) other similar circumstances.

(6) The plan administrator may rely on the information and certification provided by a participant in connection with the participant's request for an emergency withdrawal. The participant is solely responsible for the sufficiency, accuracy, and veracity of the information.

(7) If the plan administrator denies a participant's request for an emergency withdrawal or if the participant disagrees with the amount of the approved emergency withdrawal, the participant may appeal to the Employees Retirement System of Texas in accordance with §87.23 of this title (relating to the Grievance Procedure).

(8) When submitting a request for an emergency withdrawal, the participant must certify, in a form prescribed by the plan administrator, that the severe financial hardship cannot be relieved by cessation of deferrals under the plan, as well as other means set forth in paragraph (2)(B)(i)-(v) of this subsection.

(9) The plan administrator may approve an emergency withdrawal request from a primary or secondary beneficiary.

(10) The plan administrator may not exceed the amount reasonably necessary to satisfy the emergency need (which may include any amounts necessary to pay any federal, state or local income taxes or penalties reasonably anticipated to result from the distribution).

(k) A participant may elect to receive a one-time distribution of the total account balance if:

(1) such amount does not exceed the $5000 dollar limit under Code §457, §457(e)(9), or the dollar limit under Code §411(a)(11) if greater as of the date that payments commence or on the date of the participant's death. In such event, payment shall be made to the participant (or to the beneficiary if the participant is deceased) in a lump sum equal to the participant's account balance;

(2) no amount has been deferred under the plan with respect to such participant during the two-year period ending on the date of the distribution;

(3) there has been no prior distribution under the plan to such participant to which this subsection applied; and

(4) a one-time election form is completed and submitted to the plan administrator through the participant's state benefits coordinator [~~agency coordinator~~].

(l) Naming of beneficiaries. When a participant or beneficiary files a distribution agreement, the participant or beneficiary may name one or more primary and secondary beneficiaries. The naming of beneficiaries in a distribution agreement supersedes any previous naming of beneficiaries in a participation agreement or change agreement.

(m) Death of a participant when the participant has named a beneficiary.

(1) This subsection applies only if a participant has named a beneficiary in a participation agreement, change agreement, beneficiary designation form or distribution agreement.

(2) The plan administrator shall order a distribution to a primary beneficiary if the beneficiary:

(A) survives the participant; and

(B) is alive on the date of the order.

(3) The plan administrator shall order a distribution to a secondary beneficiary if:

(A) the secondary beneficiary survives the participant;

(B) the secondary beneficiary is alive on the date of the order; and

(C) no primary beneficiaries survive the participant.

(4) The plan administrator shall order a distribution in accordance with subsection (p) of this section if a primary or secondary beneficiary survives the participant but is not alive on the date of the order.

(5) This paragraph applies if a participant designates more than one primary beneficiary and more than one primary beneficiary survives the participant. The plan administrator shall order the distribution of the participant's deferrals and investment income to the surviving primary beneficiaries in equal shares unless the distribution agreement provides otherwise. The estates and heirs of the primary beneficiaries who did not survive the participant and the surviving secondary beneficiaries, if any, may not receive any benefits.

(6) This paragraph applies if a participant designates more than one secondary beneficiary, more than one secondary beneficiary survives the participant, and no primary beneficiary survives the participant. The plan administrator shall order the distribution of the participant's deferrals and investment income to the surviving secondary beneficiaries in equal shares unless the distribution agreement provides otherwise. The estates and heirs of the primary and secondary beneficiaries who did not survive the participant may not receive any benefits.

(7) The plan administrator shall order the lump-sum payment to the participant's estate of the balance of the participant's deferrals and investment income if:

(A) the participant named a primary and a secondary beneficiary but neither survived the participant; or

(B) the participant named a primary beneficiary but did not name a secondary beneficiary and the primary beneficiary did not survive the participant.

(8) The plan administrator shall order the lump-sum distribution of a participant's deferrals and investment income to the person entitled to receive the distribution if the person is alive on the date of the order and the person files a distribution agreement requesting a lump-sum distribution.

(9) When the plan administrator orders a distribution to a primary or secondary beneficiary, the plan administrator's order must be in accordance with the beneficiary's distribution agreement so long as the agreement complies with the sections in this chapter.

(10) This paragraph applies when the plan administrator orders other than a lump-sum distribution to a primary or secondary beneficiary and distributions to the participant did not begin before the participant's death. For distributions to a surviving spouse, any distribution made before the calendar year in which the participant would have attained age 70.5 is not a required minimum distribution. For the calendar year in which the participant would have attained age 70.5 or any later year, the amount of the minimum annual distribution payment may be treated as the amount of the required minimum distribution. Notwithstanding a primary or secondary beneficiary's distribution agreement, the amount distributed must be calculated so that the distributions:

(A) will begin no later than December 31 in the year that the participant would have attained age 70.5 or December 31 of the year following the participant's death, whichever is later for a spousal beneficiary; or

(B) December 31 of the year following the participant's death and entire amount must be distributed by the end of the fifth year following the year of participant's death for non-spousal beneficiary.

(C) will be made over the life of the person receiving the distributions or over a period not extending beyond the life expectancy of the person (using the single life table from the Income Tax Regulations);

(D) will be made in substantially non-increasing amounts;

(E) will be made annually or more frequently than annually after the first distribution; and

(F) will satisfy the minimum distribution requirements of the Code §457(d)(2), §401(a)(9), and associated statutes and regulations.

(11) This paragraph applies when the plan administrator orders other than a lump-sum distribution to a primary or secondary beneficiary and distributions to the participant began before the participant's death. Notwithstanding a primary or secondary beneficiary's distribution agreement, the amount distributed to the primary or secondary beneficiary must be calculated so that the distributions:

(A) will be made at least as rapidly as under the method of distribution selected by the participant; and

(B) will satisfy the minimum distribution requirements of the Code §457(d)(2), and §401(a)(9).

(12) If a participant dies before distributions to him began and the beneficiary or secondary beneficiary entitled to receive the participant's deferrals and investment income is the participant's surviving spouse, this paragraph applies.

(A) Paragraph (10) of this subsection applies to the distributions to the surviving spouse except as specified in this paragraph.

(B) Notwithstanding paragraph (10) of this subsection, the surviving spouse may delay the start of the receipt of the deferrals and investment income until a date not later than the date when the participant would have attained age 70.5.

(C) Notwithstanding paragraph (10) of this subsection, after a distribution to the surviving spouse begins, the entire amount must be paid over a period not exceeding the spouse's life expectancy using the single life table from the Income Tax Regulations for the beneficiary's age on the beneficiary's birthday for the year that the distribution begins, reduced by one for each year that has elapsed after that year.

(D) If the surviving spouse dies before distributions to the spouse begin, then the surviving spouse is a participant for the purpose of paragraph (10) of this subsection.

(13) For the purpose of paragraphs (10) - (12) of this subsection, life expectancies may not be recalculated annually.

(n) Death of a participant when the participant has not named a beneficiary.

(1) This subsection applies only when a participant has not named a beneficiary in a participation agreement, change agreement, beneficiary designation form, or distribution agreement.

(2) The plan administrator shall order the distribution to the participant's estate of the balance of the participant's deferrals and investment income.

(o) Death of a beneficiary.

(1) This subsection applies if:

(A) a participant named a beneficiary in a participation agreement, change agreement, or distribution agreement or a beneficiary designation form;

(B) the participant died;

(C) the beneficiary survived the participant but has since died;

(D) the plan administrator has ordered, in accordance with subsection (m) of this section, a distribution to the beneficiary or would have ordered a distribution to the beneficiary if the beneficiary had not died; and

(E) the beneficiary did not receive all the participant's deferrals and investment income before the beneficiary's death.

(2) If the deceased beneficiary filed a distribution agreement and the agreement names a primary beneficiary, the plan administrator shall:

(A) allow the primary beneficiary to have a distribution which will be made at least as rapidly as under the method of distribution selected by the participant, and which will also satisfy the minimum distribution requirements of the Code §457(d)(2), and §401(a)(9); or

(B) order a lump sum payment to the primary beneficiary's estate if the primary beneficiary survived the beneficiary who filed the distribution agreement but is not alive on the date of the order.

(3) If the deceased beneficiary filed a distribution agreement and the agreement names a secondary beneficiary, the plan administrator shall order a lump-sum payment to:

(A) the secondary beneficiary if:

(i) the secondary beneficiary is alive on the date of the order; and

(ii) no primary beneficiary survived the deceased beneficiary;

(B) the secondary beneficiary's estate if:

(i) the secondary beneficiary survived the deceased beneficiary;

(ii) the secondary beneficiary is not alive on the date of the plan administrator's order; and

(iii) no primary beneficiary survived the deceased beneficiary.

(4) The lump-sum payment must be made to the estate of the deceased beneficiary if:

(A) the deceased beneficiary's distribution agreement does not name a beneficiary;

(B) the deceased beneficiary did not file a distribution agreement; or

(C) no beneficiary named in the deceased beneficiary's distribution agreement survived the deceased beneficiary.

(5) When more than one primary or secondary beneficiary of a deceased beneficiary is entitled to a lump-sum distribution, the distributions must be made in equal shares unless the deceased beneficiary's distribution agreement provides otherwise.

(p) Distributions to minors and incompetents.

(1) The plan administrator may authorize the payment of a distribution to a person or entity other than the participant or beneficiary otherwise entitled to receive the distribution if satisfactory evidence is presented to the plan administrator that the participant or beneficiary is:

(A) a minor; or

(B) has been adjudicated by a court of law as mentally incompetent and unable to provide a valid release, receipt and discharge for the payment or is deemed so by the plan administrator.

(2) If the conditions of the preceding paragraph are satisfied, the plan administrator shall make the distribution payable to the guardian of the participant or beneficiary. Such payments shall be considered a payment to such participant or beneficiary, and shall, to the extent made, be deemed a complete discharge of any liability of the Plan, state of Texas, plan administrator and TPA for all payments required under the plan.

(3) If no guardian has been appointed and after having obtained a proper release, the plan administrator shall make the distribution payable to:

(A) the person or entity maintaining custody of the participant or beneficiary;

(B) the custodian of the participant or beneficiary under the Texas Uniform Gifts to Minors Act (Texas Property Code, §§141.002 et seq.) if the participant or beneficiary resides in the state of Texas;

(C) the custodian of the participant or beneficiary under a law similar to the Texas Uniform Gifts to Minors Act if the participant or beneficiary resides outside the state of Texas; or

(D) the court of law with jurisdiction over the participant or beneficiary.

(q) Distributions to missing persons.

(1) This subsection applies when the plan administrator is unable to determine the location of a participant or beneficiary who is entitled to a distribution.

(2) When the plan administrator does not know the location of a participant or beneficiary, the benefits coordinator [~~agency coordinator~~] for the participant or beneficiary must send a certified letter to the last known address of the participant or beneficiary.

(3) If the certified letter does not result in the discovery of the location of the participant or beneficiary, the benefits coordinator [~~agency coordinator~~] shall inform the plan administrator and provide proof to the plan administrator that the certified letter was sent.

(4) When the plan administrator does not know the location of a participant or beneficiary, the benefits coordinator [~~agency coordinator~~], TPA or plan administrator shall make a reasonable attempt to locate the participant or beneficiary through certified mail at the last known address, through notification to the Social Security Administration, the Pension Benefit Guaranty Corporation, or other appropriate source. If the participant has not responded within six (6) months, upon receiving the notification and proof of mailing, the plan administrator may direct that all benefits due the participant or beneficiary be deposited in a qualified investment product or trust fund that the plan administrator has specifically designated for this purpose and shall continue to hold the benefits due such person.

(r) Processing of distributions and emergency withdrawals. A prior plan vendor or TPA shall process distributions and emergency withdrawals and resolve administrative problems with the plan administrator within a reasonable length of time, not to exceed the 30th day after receiving a letter of authorization for distributions and not to exceed the 15th day after receiving a letter of authorization for emergency withdrawals.

(s) Loans to participants. The plan administrator is authorized to implement procedures to establish a loan program for the revised plan in compliance with Code §72(p)(2). Plan loans shall be permitted only from assets deposited in the revised plan. Participants with account balances in the prior plan must transfer those balances to the revised plan in order to qualify for a plan loan. The security of the loan is a pledge. There is a non-refundable application fee for each loan. General loans are processed without any pre-loan paperwork. A participant's execution on the loan check authorizes the plan administrator to make payroll deductions from the participant's compensation (Code §1.401(a)-21(d)). The loan balance may be prepaid at any time without penalty. The maximum number of active loans available to any participant at any given time is two (2) per plan.

(1) Loans made pursuant to this section (when added to the outstanding balance of all other loans made by the plan to the participant) shall be limited to the lesser of:

(A) $50,000 reduced by the excess (if any) of the highest outstanding balance of loans from all plans to the participant during the one year period ending on the day before the date on which such loan is made, over the outstanding balance of loans from all plans to the participant on the date on which such loan was made; or

(B) the greater of one half (1/2) of the present value of the non-forfeitable accrued benefit of the participant under the plan or $10,000.

(2) Any loan may not be for an amount less than $1,000.

(3) The terms of the loan shall:

(A) require level amortization with payments not less frequently than monthly throughout the repayment period, except that alternative arrangements for repayment may apply in the event that the participant is on a bona fide unpaid leave of absence for military leave within the meaning of §414(u) of the Code or for the duration of a leave which is due to qualified military service;

(B) require that the loan be repaid within five years unless the participant certifies in writing to the plan administrator that the loan is to be used to acquire a principal residence; and

(C) provide for either a general purpose loan or a principal residence loan with rates and terms fixed for the life of the loan. Subject to change from time to time, the interest rate for repayment is one percent (1%) over the prime rate published in the Wall Street Journal on the last business day of the prior month.

(4) Any loan to a participant under the plan shall be secured by the pledge of the portion of the participant's interest in the plan invested in such loan.

(5) In accordance with the federal Soldiers' & Sailors' Civil Relief Act of 1940, interest will accrue during the period of suspended payments at the original loan rate or at the rate of six percent (6%), whichever is less. In no event will interest on any loan exceed the maximum rate permitted by applicable law.

(6) In the event that a participant fails to make any loan payment by the last day of the calendar quarter following the calendar quarter such payment is due, a default on the loan shall occur. In the event of such default, all remaining payments on the loan shall be immediately due and payable the day following the date on which such payment was due. In the case of any loan default, the plan administrator shall apply the portion of the participant's interest in the plan held as security for the loan in satisfaction of the loan on the date of severance from employment. In addition, the plan administrator shall take any legal action it shall consider necessary or appropriate to enforce collection of the unpaid loan, and the costs of any legal proceeding or collection including, but not limited to the plan administrator's and TPA's reasonable attorneys fees, costs and prejudgment and postjudgment interest, shall be charged to the account balance of the participant. Any defaulted loans incurred will continue to accrue interest and will reduce the number of available loans. Amounts borrowed through the loan program are not taxable distributions and are not subject to federal income taxes, unless the participant defaults on the loan. If a participant retires or separates from employment, payroll deductions will stop and the loan is immediately due and payable in full. If the loan is not paid prior to the last day of the calendar quarter following the calendar quarter in which the payment was due, then the entire outstanding balance, pursuant to IRS regulations, will be considered a distribution, and the plan administrator shall report the loan to the IRS as a taxable distribution for the year that the loan defaults. Effective January 1, 2006, participants may make manual payments to pay off the loan after separating from employment. In the event a loan is outstanding or in default or both hereunder on the date of a participant's death, the participant's estate shall be the beneficiary as to the portion of participant's interest in the plan invested in such loan.

(7) In accordance with Code §72(p) and associated Treasury Regulations at §1.72(p)-1, the Plans will suspend payments for up to twelve (12) months for non-military leaves of absence if the partic-

ipant is on a bona fide leave of absence and the leave is either without pay, or the participant's after-tax pay is less than the payment amount under the terms of the loan. When payments resume, payments may not be less than the amount required under the terms of the original loan. In no event may the term of the loan be extended beyond its original due date without approval of the plan administrator. Therefore, the participant must seek a revised amortization schedule and pay higher monthly payments or continue the original payment schedule and make one or more additional payments before the end of the loan term in sufficient amounts to pay the loan in full when due.

(8) As a condition of the loan, a participant shall be required to enter into an irrevocable agreement authorizing the employer to make payroll deductions from his or her compensation as long as the participant is an employee and to transfer such payroll deduction to the Trustee or TPA in payment of such loan plus interest. Repayments of a loan shall be made by payroll deduction of equal amounts (comprised of both principal and interest) from pay, with the first such deduction to be made as soon as practicable after the loan funds are disbursed; provided, however:

(A) that a participant may prepay the entire outstanding balance of his or her loan at any time without penalty (but may not make a partial prepayment); and

(B) that if any payroll deductions cannot be made in full because a participant is on an unpaid leave of absence or is no longer employed by a participating employer (that has consented to make payroll deductions for this purpose) or the participant's paycheck is insufficient for any other reason, the participant shall pay directly to the plan the full amount that would have been deducted from the participant's paycheck, with such payment to be made by the last business day of the calendar month in which the amount would have been deducted. Such participants will repay themselves with interest through payroll deductions in equal installments over the duration of the loan. Loan repayments are deducted each pay period and posted along with contributions. Loan refinancing is not available.

(t) Federal withholding and reporting requirements.

(1) A prior plan vendor or TPA shall file all reports required by the Internal Revenue Service (IRS) when any deferrals and investment income are distributed or otherwise made available to a participant or beneficiary. Payments made to a participant during the participant's life must be reported as taxable wages on a Form 1099-R or another appropriate form which may be hereafter promulgated by the IRS. Pursuant to the provisions of Internal Revenue Service Revenue Ruling 86-109 (1986-2 CB 196), payments to the beneficiary of a deceased participant must be reported on IRS Form 1099-R (or another appropriate form which may be hereafter promulgated by the IRS) as taxable income of the beneficiary.

(2) A prior plan vendor or TPA shall file an application for authorization to act as agent of the state of Texas, or effective January 1, 1999, the plan, with the District Director of the Internal Revenue Service Center where the prior plan vendor or TPA files its returns. The application shall include Form 2678 - Employer Appointment of Agent under §3504 of the Code, which shall be supplied by the plan administrator, and shall be completed and filed in accordance with the instructions set forth in Internal Revenue Service Publication 1271. The prior plan vendor shall promptly furnish to the plan administrator a copy of such vendor's letter of authorization from the Internal Revenue Service approving the appointment of the prior plan vendor as agent.

(3) When reporting to the Internal Revenue Service, the prior plan vendor and TPA shall use the vendor's Federal Employer Identification Number and shall comply with all requirements of Revenue Procedure 70-6 as set out in Internal Revenue Service Publication 1271 and as subsequently amplified or superseded by subsequent Revenue Procedures. A prior plan vendor may not use the federal employer identification number of the plan, plan administrator, TPA, or the state of Texas. Regardless of how many qualified investment products a prior plan vendor sponsors, the vendor must use the same federal employer identification number for all reports to the Internal Revenue Service.

(4) Federal tax withholding is mandatory for certain distributions to participants or beneficiaries. Distributions with a periodic payout of less than 10 years and lump sum distributions, other than required minimum distributions, are "eligible rollover distributions" subject to a mandatory 20 percent federal income tax withholding unless distributed in a direct rollover to an eligible retirement plan. Vendors who maintain participant account balances in the prior plan shall provide the required IRC §402(f) safe harbor notice to all 457 plan participants or their beneficiaries prior to the payment of an eligible rollover distribution. Tax notices may be provided electronically or in writing to the participant. For all distributions other than eligible rollover distributions, a prior plan vendor or TPA shall accurately determine any amounts to be withheld for federal taxes based on a Form W-4P submitted by the participant at the time of a distribution. If no Form W-4P is provided, the participant shall be taxed as "single with no dependents." The Tax Equity and Fiscal Responsibility Act does not apply to a deferred compensation plan governed by the Code §457.

(5) Total death benefits, including life insurance proceeds, are taxable as ordinary income to the beneficiary and must be reported on a Form 1099-R in accordance with subsection (m) of this section.

(6) A prior plan vendor or TPA shall mail a copy of all reports filed with the Internal Revenue Service about a participant or beneficiary to the participant's or beneficiary's home address.

(u) Notwithstanding any provisions to the contrary, the option to receive periodic distributions from a product in the "prior plan" by a terminated participant or beneficiary whose original distribution begins on or after October 1, 2004 is removed. Effective October 1, 2004, terminating participants and beneficiaries must transfer all funds to the revised plan, receive a lump sum distribution of their entire plan balance, or roll their entire account balance into an account outside of the prior plan.

§87.19. Reporting and Recordkeeping by Prior Plan Vendors.

(a) Definition of current market value. In this section, the term "current market value" has the following meanings.

(1) For an investment in a qualified investment product offered by a bank, credit union, or savings and loan association, current market value means the amount of deferrals plus investment income minus withdrawals minus applicable fees.

(2) For an investment in a mutual fund, current market value means the price of each share at the end of the calendar quarter multiplied by the number of shares purchased with deferrals and investment income minus applicable fees.

(3) For an investment in a term life insurance product, the current market value is usually zero.

(4) For an investment in a life insurance product, current market value means the cash value of the product minus applicable fees.

(5) For an investment in an annuity, current market value equals the amount of deferrals plus investment income minus payouts minus applicable fees. For annuitized accounts, current market value means the present value of all remaining payments, taking into con-

sideration the prevailing statutory interest rates pursuant to the Texas Insurance Code, Article 3.28.

(b) Reports to participants or beneficiaries.

(1) Generally.

(A) A prior plan vendor shall issue a report after the end of each calendar quarter to each participant or beneficiary whose deferrals and investment income are invested in a qualified investment product offered by the prior plan vendor, except if the investment is in a product that is annuitized.

(B) The report shall cover all transactions during a calendar quarter.

(C) A prior plan vendor shall ensure that the participant or beneficiary receives the report no later than the 45th day after the end of each calendar quarter.

(D) The report must show for each qualified investment product:

(i) the amount of the participant's or beneficiary's deferrals and investment income in the product, including transfers;

(ii) the amount of applied product costs or surrender charges;

(iii) the date and amount of withdrawals during the reporting period; and

(iv) the current market value of the participant's or beneficiary's deferrals and investment income.

(2) Investments in life insurance products. The requirements of the preceding paragraph apply to investments of deferrals and investment income in life insurance products except:

(A) the report is due at least once each calendar year instead of after each calendar quarter; and

(B) the period covered by the report may be either the calendar year or the product year.

(3) Final reports. If a participant or beneficiary receives a lump-sum distribution, the prior plan vendor or TPA from whom the lump-sum distribution is made shall issue a final report to the participant or beneficiary containing the information required in paragraph (1) of this subsection. The report must accompany the lump-sum distribution.

(c) Capital category reports. Once each quarter, or more frequently if appropriate, a prior plan vendor which is a bank or savings and loan association shall report to the plan administrator that financial information regarding capital categories and risk-based ratios described in §87.7(i) and (j) of this title (relating to prior plan vendor participation).

(d) Reports and remittance to the plan administrator.

(1) Frequency and coverage of reports and payment of fees. Every vendor in the prior plan that has participant or beneficiary deferrals, and/or investment income, must ensure that the plan administrator receives a report no later than the 15th day after the end of each calendar quarter. The fiscal year end report must include transactions for July and August. Every prior plan vendor must also remit any fees assessed to it by the plan administrator, no later than the 15th day after the end of each quarter. Every vendor must ensure that the plan administrator receives a special report at the end of the fiscal year (August 31st), no later than fifteen days past fiscal year end - September 15th, in addition to the normal quarterly reporting schedule. The report must be in the format specified in this subsection and must cover all transactions during the calendar quarter.

(2) Content of reports. For each participant or beneficiary whose deferrals and investment income are invested in a qualified investment product offered by the vendor, the report required by this subsection must contain but is not limited to:

(A) the participant's or beneficiary's name, agency code and social security number(s);

(B) a list of the qualified investment products in which the participant's or beneficiary's deferrals and investment income have been invested;

(C) the amount of monthly deferrals for the reporting period separated and listed per month;

(D) the interest and other income earned or lost during the reporting period through the investment of the deferrals and investment income;

(E) the amount of federal income tax withheld during the reporting period;

(F) the current market value of each participant's or beneficiary's deferrals and investment income in each qualified investment product, including, if appropriate, the number of shares and per share market value;

(G) the amount of fees that the prior plan vendor charged during the reporting period;

(H) the amount transferred in and out as a result of a change of product within a company, identified separately by each internal transfer;

(I) the amount of each plan administrator directed transfer in or out; and

(J) the amount of each separate net distribution to the participant or beneficiaries, except that multiple payments that fall on the same day should be combined into one account for quarterly reporting purposes.

(K) a report specifying how the fees assessed to the prior plan vendor by the plan administrator were calculated and the asset base on which the fee was based.

(3) Format of reports.

(A) All reports must be in the format prescribed by the plan administrator and follow the DCP quarterly reporting specifications on a:

(i) 5 1/4 or 3 1/2 inch high quality PC diskette;

(ii) manual form; or

(iii) electronic file transfer - use of file transfer protocol (FTP), via the Internet or as an attachment to an electronic mail (E-mail).

(B) Only prior plan vendors with less than fifty participants are eligible to report on a manual form.

(C) Before a prior plan vendor may use a medium other than a manual form to file a quarterly report with the plan administrator, the vendor must submit a written request along with an electronic transfer file, or diskette to the plan administrator. The ERS must approve and make arrangements with the prior plan vendor prior to testing the electronic file transfer. The electronic transfer file, or diskette must be in the format and contain the information prescribed by the DCP reporting specifications and contain the information that the plan administrator

requires including the items listed in paragraph (d)(2)(A) - (J) of this subsection. Failure to submit data in the specified format will result in the return of the media without processing. If the plan administrator determines that the electronic transfer file or diskette is inadequate, the plan administrator shall ensure that the number of participants whose deferrals and investment income are invested at any given time in the vendor's qualified investment products does not exceed 49.

(D) The product types must be defined and coded as prescribed by the plan administrator and as in the DCP quarterly reporting specifications.

(E) If a participant or beneficiary has invested deferrals and investment income in two or more qualified investment products offered by the same prior plan vendor and the products are of the same type, then the prior plan vendor must report a cumulative total of those deferrals and investment income.

(4) A prior plan vendor that fails to submit to the plan administrator any required report with an authorized signature or the assessed fee will be subject to formal reprimand. After two formal reprimands, a vendor may be expelled from the plan and subject to further liability as applicable.

(5) Late reports and/or fee payment.

(A) A report or fees are delinquent if the plan administrator receives the report and/or fees after the due date.

(B) A report or fees that are received before the due date but which are returned to the vendor for completion or correction are delinquent if the plan administrator does not receive the completed or corrected version of the report or correct amount of fees within 10 days after the original due date.

(e) Recordkeeping. A prior plan vendor shall retain records concerning investments in each qualified investment product by each participant. The records must be retained until the expiration of the second year after the prior plan vendor has distributed all the participant's deferrals and investment income.

(f) Quarterly reconciliation. In accordance with §87.3(b)(3)(H) of this title (relating to Participation by State Agencies), a benefits coordinator [~~an agency coordinator~~] may be responsible for balancing participant and beneficiary records and reconciling those records with the data provided by qualified vendors and the plan administrator. Prior plan vendors shall assist the plan administrator and state agencies with correcting and explaining any discrepancies. Failure to assist the plan administrator and state agencies with this reconciliation will be considered a rules violation, and the plan administrator may take appropriate action under §87.21 of this title (relating to Remedies).

§87.33. The Economic Growth and Tax Relief and Reconciliation Act.

(a) The Economic Growth and Tax Relief and Reconciliation Act of 2001 (referred to as "EGTRRA" and/or "Act") allows a plan administrator to amend eligible 457 deferred compensation plans to provide additional benefits to participants. The following resolutions set forth the decisions and provisions effective January 1, 2002.

(b) Applicability.

(1) This section applies to the State of Texas Deferred Compensation 457 Plan as revised and adopted by the Employees Retirement System of Texas effective September 1, 2000, and filed with the Secretary of State. The plan as revised and adopted is incorporated into this section. Copies may be obtained upon request.

(2) This section also applies to the State of Texas Deferred Compensation 457 Plan adopted by the Employees Retirement System of Texas effective January 1, 1991, and as amended prior to adoption of the revised plan. The 1991 plan is referred to in this section as the "prior plan." Except as otherwise provided in this section, the provisions of §§87.1 - 87.31 of this title continue to apply to participation agreements, distribution agreements, and prior plan vendor contracts entered into pursuant to applicable provisions of the prior plan.

(3) This section takes effect January 1, 2002 and shall apply to deferrals, transfers/rollovers and distributions that take place on or after January 1, 2002.

(c) Administration of the revised plan. The plan administrator shall administer the revised plan in the manner provided in the plan and §87.3 of this title (relating to Administrative and Miscellaneous Provisions).

(d) Catch-up contributions during the three years prior to normal retirement age are increased to twice the applicable deferral limit.

(e) A participant age 50 or older during any calendar year shall be eligible to make additional pre-tax contributions in accordance with Code §414(v) applicable to 457 plans, in excess of normal deferral amounts. A participant who elects to defer contributions under the normal catch-up provisions may not also defer under the special catch-up and Code §414(v).

(f) Plan Loans--The plan administrator is authorized to implement procedures to establish a loan program for the revised plan. Plan loans shall be permitted only from assets deposited in the revised plan. Participants with account balances in the prior plan must transfer those balances to the revised plan in order to qualify for a plan loan.

(g) Distributions.

(1) Change or Cancellation of Irrevocable Distribution Elections--A participant or a beneficiary of a participant who previously filed an irrevocable distribution election under the prior plan or under the revised plan may change that distribution election or cancel that distribution election by notifying the plan administrator. Such notification must be in writing and received by the plan administrator at least 30 days prior to the scheduled distribution date.

(2) Purchase of Service

(A) A participant may request a trustee-to-trustee transfer of assets from the prior plan or the revised plan to a governmental defined benefit plan in the same state or another state for the purchase of permissible service credit (as defined in Code §414(d), §414(p), and §415(n)(3)(A) as amended by the Pension Protection Act of 2006) under such plan or a repayment to which Code §415 does not apply by reason of subsection (k)(3) thereof.

(B) Notwithstanding any other provision contained in this plan, the TPA, at the direction of the plan administrator, or as requested by a participant or beneficiaries, shall transfer part or all of the account of any non-terminated participant to the trust forming the Employees Retirement System of Texas, the Teacher Retirement System of Texas, the Judicial Retirement System of Texas Plan I or Plan II or any other eligible retirement plan for the purpose of purchasing service credit, provided that the recipient trust meets or purports to meet the requirements (as defined in Code §414(d), §414(p), §415(n)(3)(A) and as amended by the Pension Protection Act of 2006) and expressly permits such transfers to be accepted. In no event may the transfer exceed the amount necessary to purchase the service credit.

(3) The TPA and prior plan vendors who maintain participant account balances in the prior plan shall provide the required Code §402(f) safe harbor notice to all 457 plan participants or their beneficiaries prior to the payment of an eligible rollover distribution. Tax

notices may be provided electronically or in writing to a participant in the revised plan.

(h) Certification Regarding Cessation of Deferrals upon Emergency Withdrawal--In submitting a request for an emergency withdrawal, the participant must certify, in a form prescribed by the plan administrator or TPA, that the severe financial hardship cannot be relieved by cessation of deferrals under the plan, as well as other means set forth in §87.17(j)(2)(B)(i) - (v) of this title.

(i) Qualified Domestic Relations Orders--Upon receipt of a certified copy of a qualified domestic relations order, the plan administrator may distribute to an alternate payee in a lump sum immediate distribution, the proceeds as directed by the order. The plan administrator shall develop procedures for the implementation of this section.

(j) The normal maximum amount of deferrals is within the maximum amount allowed by the Internal Revenue Service [~~increased to the lesser of $15,500~~] (as periodically adjusted in accordance with Code §457(e)(15)) or 100% of a participant's includible compensation.

(k) At a participant's or beneficiary's request, the plan administrator shall process a trustee-to-trustee transfer of an eligible rollover distribution upon receipt of appropriate instructions from the receiving plan.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704722
Paula A. Jones
General Counsel
Employees Retirement System of Texas
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 867-7421

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 10. GUARDIANSHIP SERVICES
SUBCHAPTER C. CONTRACTOR REQUIREMENTS

40 TAC §§10.311, 10.315, 10.321

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §10.311, concerning qualifications and training requirements for contractor employees; §10.315, concerning criminal background checks; and §10.321, concerning roles and responsibilities of case managers, in Chapter 10, Guardianship Services.

BACKGROUND AND PURPOSE

The purpose of the amendments to §10.311 and §10.321 is to update contractor employee qualifications with regard to certification by the Guardianship Certification Board (GCB). Effective September 1, 2007, Texas Government Code, §111.042 requires a guardianship contractor's case manager to be certified by the GCB. Before September 1, 2007, §10.311 allowed a case manager to have a certain level of education or experience as an alternative to certification by the GCB. The pre-September 1, 2007, education and experience criteria are now obsolete and no longer necessary to have in rule.

The purpose of the amendment to §10.315 is to implement the provisions of Senate Bill (SB) 291, 80th Legislature, Regular Session, 2007, which amended the Texas Probate Code, Section 698. Texas Probate Code, §698(a-1) - (a-3) requires DADS to obtain criminal history record information for anyone who provides guardianship services to a ward of DADS or a ward who is referred by DADS, including someone who is an employee or a volunteer with DADS or a guardianship contractor.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §10.311 removes obsolete criteria for a guardianship contractor's case manager that were in effect until September 1, 2007. The proposed amendment requires that a guardianship contractor's case manager be certified by the GCB.

The proposed amendment to §10.315 removes a requirement for a guardianship contractor to obtain a criminal background check on its employees and volunteers. The amendment reflects the Texas Probate Code, §698(a-1) - (a-3), which requires DADS to obtain the criminal background check on a contractor's employees and volunteers. DADS will obtain a criminal background check on a contractor's prospective employees and volunteers, and annually on a contractor's current employees and volunteers. The amendment requires a contractor to wait until DADS has notified the contractor of the person's eligibility for employment or volunteering before making an offer of employment, or before allowing a prospective employee or volunteer to have access to a ward referred to the contractor by the DADS Guardianship Program.

The proposed amendment to §10.321 updates a cross-reference to §10.311, to reflect the amendment to §10.311 in this proposal.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendments because the proposal places the responsibility of conducting the criminal background checks with DADS, rather than with the guardianship contractors.

PUBLIC BENEFIT AND COSTS

Gary Jessee, DADS Assistant Commissioner for Access and Intake, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that DADS rules regarding employment qualifications for guardianship case managers will be up to date and that DADS rules regarding criminal background checks associated with the DADS Guardianship Program will conform to state law.

Mr. Jessee anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Cindy Kenneally at (512) 438-4151 in DADS' Guardianship Section, Oversight and Community Support Unit. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-024, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714- 9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 024" in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; Texas Human Resources Code, §§161.101 - 161.113, which authorizes DADS to serve as guardian of the person or estate, or both, for an incapacitated individual and, if appropriate, to contract with another entity to provide guardianship services; and Texas Probate Code, §698(a-1) - (a-3), which requires DADS to obtain criminal history record information relating to each individual who is or will be providing guardianship services to a ward of or referred by DADS.

The amendments implement Texas Government Code, §531.0055; Texas Human Resources Code, §§161.021 and 161.101 - 161.113; and Texas Probate Code, §698(a-1) - (a-3).

§10.311. Qualifications and Training Requirements for Contractor Employees.

(a) A contractor must:

(1) (No change.)

[~~(2) until September 1, 2007, employ case managers who have at least one of the following qualifications:~~]

[~~(A) a bachelor's degree from an accredited college or university and a minimum of one year of full-time experience in direct social service work;~~]

[~~(B) 60 credit hours from an accredited college or university and certification by the National Guardianship Association; or~~]

[~~(C) certification by the Guardianship Certification Board, as authorized in Texas Government Code, §111.042;~~]

(2) [~~(3)~~] [~~on and after September 1, 2007,~~] employ case managers who are certified by the Guardianship Certification Board, as authorized in Texas Government Code, §111.042;

(3) [~~(4)~~] provide an orientation program that explains:

(A) the responsibilities associated with each new employee's position;

(B) the responsibilities of the guardianship program to the ward;

(C) the relationship of the ward to the guardianship program and to DADS;

(D) an overview of the Texas Probate Code and the program's responsibilities per the code;

(E) an overview of any rules or regulations that affect the guardianship program;

(F) an overview of aging and disability; medical issues, including medical treatment and medication; and end-of-life decisions; and

(G) the principles of person-directed planning;

(4) [~~(5)~~] maintain a copy of the information presented at the orientation for each employee and have signed documentation of attendance at the orientation; and

(5) [~~(6)~~] provide ongoing training based upon the needs of the ward as described in subsections (b) and (c) of this section and any changes in rules or state law.

(b) Ongoing training as required in subsection (a)(5) [~~(a)(6)~~] of this section must be documented and each participant must sign that the participant attended the training. At a minimum, training must include:

(1) - (7) (No change.)

(c) In addition to the orientation and training specified in subsections (a)(3) [~~subsection (a)(4)~~] and (b) of this section, a contractor must provide training to case managers in the following areas:

(1) - (3) (No change.)

§10.315. Criminal Background Checks.

(a) (No change.)

(b) To ensure compliance with subsection (a) of this section, DADS obtains criminal history record information (a criminal background check) relating to [~~the contractor must obtain a criminal background check of~~] a prospective employee or volunteer of a contractor who will have access to a ward, the estate of a ward, or the [~~contact with a ward or with the estate or~~] benefits of a ward referred by the DADS Guardianship Program. Based on the criminal history record information, DADS notifies the contractor of the prospective employee's or volunteer's eligibility to be employed or to volunteer. A contractor must not make an offer of employment to a prospective employee or allow a prospective employee or volunteer to have access to a ward, the estate of a ward, or the benefits of a ward referred by the DADS Guardianship Program before DADS notifies the contractor of the person's eligibility for employment or volunteering. On an annual basis, DADS obtains criminal history record information related to an employee or volunteer of a contractor who has access to a ward, the estate of a ward, or the benefits of a ward referred by the DADS Guardianship Program. [~~A criminal background check must be conducted in conjunction with employment by the contractor and repeated annually by the anniversary date of hire.~~]

(1) The following offenses under the Texas Penal Code permanently bar an individual from employment or from volunteering with a contractor:

(A) - (R) (No change.)

(2) All other offenses under the Texas Penal Code or the Texas Health and Safety Code, Chapter 481 (Texas Controlled Substances Act) are a bar to employment or volunteering with a contractor but may be waived as described in subsection (c) of this section.

(c) If an employee or volunteer has successfully fulfilled all requirements and conditions imposed by the court for an offense described in subsection (b)(2) of this section and if there are extenuating circumstances that would justify the individual's employment or volunteering with the contractor, the contractor may make a written request to the director of the DADS Guardianship Program for a waiver of subsection (b)(2) of this section. The director will not waive the requirement for any offense described in subsection (b)(1) of this section.

§10.321. Roles and Responsibilities of Case Managers.

(a) A contractor must ensure that its case managers meet the qualifications as specified in §10.311(a)(2) [~~§10.311(a)(2) - (3)~~] of this chapter (related to Qualifications and Training Requirements for Contractor Employees).

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704713
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 438-3734

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CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION

SUBCHAPTER N. REHABILITATIVE SERVICES

40 TAC §19.1306

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), an amendment to §19.1306, concerning payment for specialized and rehabilitative services, in Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification.

BACKGROUND AND PURPOSE

The purpose of the amendment to §19.1306 is to remove rule language regarding the methodology used to set reimbursement rates for specialized and rehabilitative services delivered to Medicaid-eligible individuals in nursing facilities. HHSC is the agency responsible for determining the rate-setting methodology for those services. Therefore, HHSC is proposing a related rule at 1 TAC §355.313, Reimbursement Methodology for Nursing Facility Specialized and Rehabilitative Services.

The amendment also clarifies rule language, updates agency names, and updates mailing address information.

SECTION-BY-SECTION SUMMARY

Throughout the proposed amendment, references to the Texas Department of Human Services or DHS are replaced with references to DADS to ensure that rule language reflects agency name changes resulting from the consolidation of health and human services agencies in 2004. In addition, plural wording is changed to singular to increase clarity. Terminology has been changed to be consistent within the section and with the proposed HHSC rule at 1 TAC 355.313. Thus, "paid" has been changed to "reimbursed;" "visit" has been changed to "session;" and "prior authorization" has been changed to "pre-certification."

The amendment to subsection (a) adds a reference to the proposed HHSC rule regarding the reimbursement methodology for specialized and rehabilitative services. The amendment to subsection (b) references the exception to the requirement that services be pre-certified by DADS, which is stated in subsection (c)(1).

To be consistent with the proposed new HHSC rule at 1 TAC §355.313, DADS is deleting subsection (c) regarding the methodology used to calculate reimbursement rates paid to nursing facilities for delivery of specialized and rehabilitative services to Medicaid-eligible individuals. HHSC's proposed rule at 1 TAC §355.313(b), establishes the reimbursement methodology used to determine rates for specialized and rehabilitative services. Rules regarding reimbursement rates and how they are determined most appropriately belong in HHSC rules because that agency is responsible for the development of reimbursement rates for specialized and rehabilitative services in nursing facilities.

The amendment to new subsection (d) replaces the term "last approved treatment day" with the more descriptive language of "the last day services are provided in accordance with a single pre-certification by DADS." Subsection (f) is deleted because it was only needed for the first twelve months the rule was in effect. In new subsection (e), the reference to "adjustments" is deleted, as new subsection (d) provides that a complete and accurate claim must be received by DADS within the stated twelve-month period, making the reference to an adjustment received within that period unnecessary. New subsection (f) provides that a resident is entitled to a fair hearing if DADS denies a request for pre-certification of services. The address for requesting such a hearing has been updated.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendment is in effect, enforcing or administering the amendment does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that there is no adverse economic effect on small businesses or micro- businesses as a result of enforcing or administering the amendment, because the proposal places no new requirements on businesses that would have a significant cost to business.

PUBLIC BENEFIT AND COSTS

Barry C. Waller, DADS Assistant Commissioner for Provider Services, has determined that, for each year of the first five years the amendment is in effect, the public benefit expected as a result of enforcing the amendment is that DADS' rules will no longer contain obsolete references to reimbursement methodology.

Mr. Waller anticipates that there will not be an economic cost to persons who are required to comply with the amendment. The amendment will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Owen Wheeler at (512) 438- 4385 in DADS' Provider Services/Institutional Services. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-016, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 016" in the subject line.

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code, §161.021.

§19.1306. Payment for Specialized and Rehabilitative Services.

(a) DADS [~~The Texas Department of Human Services (DHS)~~] reimburses a nursing facility [~~facilities and Title XVIII-certified providers~~] for specialized [~~Specialized~~] and rehabilitative services [~~Rehabilitative Services~~] based on fees determined by the Health and Human Services Commission in accordance with 1 TAC §355.313 (relating to Reimbursement Methodology for Specialized and Rehabilitative Services).

(b) The services must:

(1) be ordered by the attending physician; and

(2) except as provided in subsection (c)(1) of this section, be pre-certified [~~have prior authorization~~] by DADS [~~DHS~~].

[~~(c) DHS reimburses:~~]

[~~(1) nursing facilities the maximum allowable Medicaid rate per visit as determined by the Texas Health and Human Services Commission (HHSC);~~]

[~~(2) therapy providers the interim rate per visit as determined by Medicare.~~]

(c) [~~(d)~~] A session [~~visit~~] is [~~defined as~~] one physical, occupational, or speech therapy service performed for one resident. An evaluation is reimbursed [~~paid~~] at the same rate as a session [~~one visit~~].

(1) One evaluation is reimbursed [~~paid~~] without being pre-certified by DADS [~~prior authorization~~].

(2) An [~~Any~~] additional evaluation [~~evaluations~~] must be supported by the attending physician's documentation that indicates a new illness or [~~,~~] injury, or a substantive change in a pre-existing condition.

(d) [~~(e)~~] A complete [~~Complete~~] and accurate claim [~~claims~~] for services must be received by DADS [~~DHS~~] within 12 months after [~~from~~] the last [~~approved treatment~~] day [~~the~~] services are [~~were~~] provided in accordance with a single pre-certification by DADS.

[~~(f) Claims for services delivered before the effective date of this section must be submitted within 12 months of the effective date of this section.~~]

(e) [~~(g)~~] A claim [~~Adjustments to claims must be received by DHS's claims processor during the applicable 12-month period. Claims and adjustments~~] rejected [~~or denied~~] during the 12-month period through no fault of the provider may be reimbursed [~~paid~~] upon approval by DADS [~~DHS~~].

(f) [~~(h)~~] A resident whose request for pre-certification of Medicaid rehabilitative or specialized services is denied is entitled to a fair hearing in accordance with rules of HHSC regarding Medicaid fair hearings. A request [~~Requests~~] for a fair hearing [~~appeals of denials of prior authorizations or re-certifications~~] must be made [~~in writing by the nursing facility administrator~~] to: Texas Department of Aging and Disability Services, Attn: Rehabilitative Services, P.O. Box 149030 (MC W-400) [~~Rehabilitative/Specialized Services, Texas Department of Human Services, P.O. Box 149030 (W-519)~~], Austin, Texas 78714-9030. The request [~~for appeal~~] must be received by DADS within 90 days after [~~the 30th day from~~] the date the notice of action is mailed to [~~of~~] the resident [~~original denial determination~~].

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200704716
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 438-3734

CHAPTER 92. LICENSING STANDARDS FOR ASSISTED LIVING FACILITIES

SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §§92.10, 92.15, 92.20

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §92.10, concerning criteria for licensing; §92.15, concerning renewal procedures and qualifications; §92.20, concerning license fees; and §92.51, concerning licensure of facilities for persons with Alzheimer's disease, in Chapter 92, Licensing Standards for Assisted Living Facilities.

BACKGROUND AND PURPOSE

The purpose of the amendments is to implement portions of Senate Bill (SB) 1318, 80th Legislature, 2007. Senate Bill 1318, in part, amended Texas Health and Safety Code, §247.023 to provide that a license DADS issues to an assisted living facility is valid for two years; to allow the HHSC executive commissioner, on behalf of DADS, to adopt a system under which a license expires on various dates during the two-year period; and to prorate the license fee for the year in which a license expiration date is changed. The proposed amendments revise references from a one-year license to a two-year license and establish a staggered system of license renewals and prorated license fees, including renewals and fees for the licensing of Alzheimer's facilities, for the first two years in which the rules are in effect.

Senate Bill 1318 also amended Texas Health and Safety Code, §247.024, to raise the maximum amount of a license fee to $1,500. The proposed amendments set new license fees to accommodate the new two-year license period and change the maximum license fee from $750 to $1,500.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §92.10 revises subsection (g) to provide that an assisted living facility license is valid for two years, except a license issued in accordance with the staggered system of license renewals established in proposed §92.15(b)(1).

The proposed amendment to §92.15 establishes a staggered system of license renewals for assisted living facilities, as authorized by Texas Health and Safety Code, §247.023. For two years after the effective date of the proposed section, DADS will issue a renewal license that is valid for one year to a facility with a facility identification number ending in an odd number. All subsequent license renewals for a facility with a facility identification number ending in an odd number will be valid for two years. DADS will issue a renewal license that is valid for two years to a facility with a facility identification number ending in an even number. The proposed amendment to §92.15 also revises a reference to the "annual licensing fee" and corrects subsection cross-references within the section.

The proposed amendment to §92.20 sets new license fees for Type A, Type B, Type E, and Type C assisted living facilities to accommodate the new two-year license period and establishes a prorated license fee for a one-year license issued in accordance with the staggered system of license renewals described in proposed §92.15(b). The amendment also sets a new fee for certification of Alzheimer's facilities to accommodate the new two-year certification period and establishes a prorated fee for a one-year certification issued in accordance with the staggered system of certification renewals described in proposed §92.51(f)(1).

The proposed amendment to §92.51 changes the certification period for an Alzheimer facility from one year to two years and establishes a staggered system of certification renewals for Alzheimer's facilities. For two years after the effective date of the proposed section, DADS will renew an Alzheimer's certification for one year for an Alzheimer's facility with a facility identification number ending in an odd number. All subsequent Alzheimer's certification renewals for a facility with a facility identification number ending in an odd number will be valid for two years. DADS will renew an Alzheimer's certification for two years for an Alzheimer's facility with a facility identification number ending in an even number.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendments, because, although license fees are doubling, the time of the license period is also doubling; hence, facilities will have no net increase in fees to pay. The proposal ensures that the fee for a license issued for less than two years is assessed proportionately.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that DADS' rules will be in compliance with state law and that DADS will have a standard two-year licensure period across the programs DADS regulates.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Calvin Green at (512) 438-4962 in DADS' Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-027, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing

comments, please indicate "Comments on Proposed Rule 027" in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

The amendments implement Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §247.023 and §247.024.

§92.10. Criteria for Licensing.

(a) - (f) (No change.)

(g) DADS issues a license to a facility meeting all requirements of this chapter. A license is valid for two years, except as provided by §92.15(b)(1) of this subchapter (relating to Renewal Procedures and Qualifications) [~~one year~~]. The facility must not exceed the maximum allowable number of residents specified on the license.

§92.15. Renewal Procedures and Qualifications.

(a) Each license issued under this chapter must be renewed before the license expiration date [~~annually~~]. Each license expires two years [~~twelve months~~] from the date issued, except as provided by subsection (b)(1) of this section. A license issued under this chapter is not automatically renewed.

(b) A facility must submit an application for license renewal and a renewal license will be valid as follows:

(1) For two years after the effective date of this section, a facility with a facility identification number that ends in an odd number (1, 3, 5, 7, or 9) must submit an application to renew its license before the expiration date on the license in accordance with this section. The facility's first renewal license issued after the effective date of this section is valid for one year, and subsequent renewal licenses are valid for two years.

(2) A facility with a facility identification number that ends in an even number (0, 2, 4, 6, or 8) must submit an application to renew its license before the expiration date on the license in accordance with this section. The facility's renewal licenses are valid for two years.

(c) [~~(b)~~] Each license holder must, at least 45 days before the expiration of the current license, file an application for renewal with DADS. DADS considers that an individual has filed a timely and sufficient application for the renewal of a license if the license holder submits:

(1) a complete application to DADS, and DADS receives the complete application at least 45 days before the current license expires;

(2) an incomplete application to DADS with a letter explaining the circumstances that prevented the inclusion of the missing information, and DADS receives the incomplete application and letter at least 45 days before the current license expires; or

(3) a complete application to DADS, DADS receives the application during the 45-day period ending on the date the current license expires, and the license holder pays a fine under the administrative penalties described in Subchapter H, Division 9 of this chapter (relating to Administrative Penalties).

(d) [~~(c)~~] If the application is postmarked by the filing deadline, the application is considered to be timely filed if received in DADS' Licensing and Credentialing Section, Regulatory Services Division, within 15 days after the date of the postmark, or within 30 days after the date of the postmark and the license holder proves to the satisfaction of DADS that the delay was due to the shipper. It is the license holder's responsibility to ensure that the application is timely received by DADS.

(e) [~~(d)~~] Failure to file a timely and sufficient application will result in the expiration of the license.

(f) [~~(e)~~] The application for renewal must contain:

(1) information as required by §92.12 of this chapter (relating to Applicant Disclosure Requirements);

(2) the license fee as described in §92.20 of this subchapter (relating to License Fees) [~~annual licensing fee~~]; and

(3) if applicable under subsection (h)(2) [~~(g)(2)~~] of this section, a copy of the license holder's required accreditation report to the accreditation commission.

(g) [~~(f)~~] The renewal of a license may be denied for the same reasons an original application for a license may be denied (see §92.17 of this chapter relating to Criteria for Denying a License or Renewal of a License).

(h) [~~(g)~~] A license holder applying for license renewal must affirmatively show that the facility meets:

(1) DADS licensing standards based on an on-site survey by DADS, which must include an observation of the care of a resident; or

(2) the standards required for accreditation based on an on-site accreditation survey by the accreditation commission.

(i) [~~(h)~~] A license holder applying for license renewal that chooses the option allowed in subsection (h)(2) [~~(g)(2)~~] of this section must contact DADS to determine which accreditation commissions are available to meet the requirements of subsection (h)(2) [~~(g)(2)~~] of this section.

§92.20. License Fees.

(a) Basic fees.

(1) Type A, Type B, and Type E. The license fee is $200 [~~$100~~] plus $10 [~~$5~~] for each bed for which a license is sought, with a maximum of $1,500 [~~$750~~]. The license fee for a one-year license issued in accordance with §92.15(b)(1) of this subchapter (relating to Renewal Procedures and Qualifications) is $100 plus $5 for each bed for which a license is sought, with a maximum of $750. The fee must be paid with each initial application and with each renewal application [~~annually with each application for renewal of the license~~].

(2) Type C. The license fee is $100 [~~$50~~]. The license fee for a one-year license issued in accordance with §92.15(b)(1) of this subchapter is $50. The fee must be paid with each initial application and with each renewal application [~~annually with each application for renewal of the license~~].

(3) (No change.)

(4) Increase in beds. An approved increase in beds is subject to an additional fee of $10 [~~$5~~] for each bed.

(b) Alzheimer's certification. In addition to the basic license fee described in subsection (a) of this section, a facility that applies for certification to provide specialized services to persons with Alzheimer's disease or related conditions under Subchapter C of this chapter (relating to Standards for Licensure) must pay an additional license fee. The additional fee is $200, except the additional fee for a facility renewing its Alzheimer's certification in accordance with §92.51(f)(1) of this chapter (relating to Licensure of Facilities for Persons with Alzheimer's Disease) is $100 for the first renewal after the effective date of this section [~~an annual fee of $100~~].

(c) Trust fund fee.

(1) In addition to the basic license fee described in subsection (a) of this section, the [~~Texas~~] Department of Aging and Disability [~~Human~~] Services (DADS) [~~(DHS)~~] has established a trust fund for the use of a court-appointed trustee as described in the Health and Safety Code, Chapter 242, Subchapter D, and Chapter 247, §247.003(b).

(2) DADS [~~DHS~~] charges and collects an annual fee from each institution licensed under Health and Safety Code, Chapter 247, each calendar year if the amount of the assisted living trust fund is less than $500,000. The fee is deposited to the credit of the assisted living facility trust fund. The fee is based on a monetary amount specified for each licensed unit of capacity or bed space, and is in an amount sufficient to provide not more than $500,000 in the trust fund. In calculating the fee, the amount will be rounded to the next whole cent.

(3) DADS [~~DHS~~] may charge and collect a trust fund fee more than once a year only if necessary to ensure that the amount in the assisted living trust fund is sufficient to make the disbursements required under Health and Safety Code, §242.0965.

(4) Failure to pay the trust fund fee within 90 days from the date assessed by DADS [~~DHS~~] may result in an assessment of an administrative penalty under the administrative penalties described in Subchapter H, Division 9 of this chapter (relating to Administrative Penalties).

(d) Fees for plan reviews.

(1) DADS [~~DHS~~] charges a fee to review plans for new buildings, additions, conversion of buildings not licensed by DADS [~~DHS~~], or remodeling of existing licensed facilities.

(2) (No change.)

(e) Payment of fees. Payment of fees must be by check, cashier's check, or money order made payable to the [~~Texas~~] Department of Aging and Disability [~~Human~~] Services. All fees are nonrefundable, except as provided by the Texas Government Code, Chapter 2005.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER C. STANDARDS FOR LICENSURE

40 TAC §92.51

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 247, which authorizes DADS to license and regulate assisted living facilities.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §247.023 and §247.024.

§92.51. Licensure of Facilities for Persons with Alzheimer's Disease.

(a) - (b) (No change.)

(c) Application for certification must be made on forms prescribed by DADS [~~the Texas Department of Human Services (DHS)~~] and must include:

(1) the fee as described in §92.20(b) of this chapter (relating to License Fees) [~~an annual of $100~~]; and

(2) a disclosure statement, using DADS' [~~DHS's~~] form, describing the nature of its care or treatment of residents with Alzheimer's disease and related disorders, which includes the preadmission process, the admission process, discharge and transfer, planning and implementation of care, change in condition issues, staff training on dementia care, the physical environment, and staffing. The disclosure statement must be updated and submitted to DADS [~~DHS~~] as needed to reflect changes in special services for residents with Alzheimer's disease or related disorders.

(d) - (e) (No change.)

(f) A certificate is valid for two years [~~one year~~] from the effective date of approval by DADS, except as provided in paragraph (1) of this subsection [~~DHS~~].

(1) For two years after the effective date of this section, an Alzheimer's facility with a facility identification number that ends in an odd number (1, 3, 5, 7, or 9) must submit an application to renew its certification as an Alzheimer's facility in accordance with this section. The facility's first renewal certificate issued after the effective date of this section is valid for one year, and subsequent renewal certificates are valid for two years.

(2) An Alzheimer's facility with a facility identification number that ends in an even number (0, 2, 4, 6, or 8) must submit an application to renew its certification as an Alzheimer's facility in accordance with this section. The facility's renewal certificates are valid for two years.

(g) A certificate will be cancelled upon change of ownership and if DADS [~~DHS~~] finds that the certified unit or facility is not in compliance with applicable laws and rules. A facility must remove a cancelled certificate from display and advertising, and the certificate must be surrendered to DADS [~~DHS~~] upon request.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §§97.2, 97.244, 97.256, 97.292, 97.295, 97.298, 97.299, 97.301, 97.403 - 97.405, and 97.602, concerning definitions, administrator qualifications and conditions and supervising nurse qualifications, emergency preparedness planning and implementation, agency and client agreement and disclosure, client transfer or discharge notification requirements, delegation of nursing tasks by registered professional nurses to unlicensed personnel and tasks not requiring delegation, nursing education, licensure and practice, client records, standards specific to agencies licensed to provide hospice services, standards specific to agencies licensed to provide personal assistance services, standards specific to agencies licensed to provide home dialysis services, and administrative penalties; new §97.259 and §97.260, concerning initial educational training in administration of agencies and continuing education in administration of agencies; and the repeal of §97.259, concerning training in administration of agencies, in Chapter 97, Licensing Standards for Home and Community Support Services Agencies.

BACKGROUND AND PURPOSE

The main purpose of the proposed amendments is to clearly specify the requirements for licensed home and community support services agencies (agencies) and hospice facilities to develop, maintain, and implement a comprehensive emergency preparedness and response plan. The amendments are proposed to address the health and safety needs of clients who reside in a residence and clients admitted to or residing in a hospice facility during a disaster.

The proposed amendments on emergency planning were written to conform with the recommendations of DADS' Emergency Task Force; the Governor's Task Force on Evacuation, Transportation, and Logistics; a written report from the United States Government Accountability Office on disaster preparedness for vulnerable populations; and current guidance from the Centers for Medicare and Medicaid Services on emergency preparedness. The recommendations were made in response to the lessons learned by federal, state, and local governments from the devastating hurricane season of 2005 in an effort to improve public health emergency preparedness and response.

The proposed amendments were also written in response to Executive Order RP57, issued by the Governor of the State of Texas on March 21, 2006. This order directed coordination among DADS and other state entities to ensure the safe and efficient evacuation of Texans with special needs in the event of a disaster. This includes developing criteria for evacuation plans for all special needs facilities and ensuring that local jurisdictions approve evacuation plans maintained by special needs facilities.

The proposal changes current emergency rule terminology to be consistent with new and updated terminology related to emergency preparedness.

The proposed amendments also update language and terminology in response to House Bill 2426, 80th Legislature, 2007, which amended the Texas Occupations Code, Chapter 301, to rename the Board of Nurse Examiners the Texas Board of Nursing.

The new sections and repeal are proposed to separate and reorganize initial and continuing educational training requirements for a first-time administrator and alternate administrator.

New §97.259 ensures that any initial training obtained prior to designation is obtained within the 12 months immediately preceding the date of designation to the position, allows a person to obtain the additional 16 hours of training prior to the date of designation, and adds that any of the additional 16 hours of initial training not on topics specified in this section must be on subjects related to the duties of an administrator.

New §97.260 adds documentation requirements for continuing education and adds that any of the 12 hours of continuing education that are not on topics specified in this section must be on subjects related to the duties of an administrator.

Finally, the proposal updates terminology and state agency names and corrects rule cross-references to ensure that the rule reflects changes resulting from the consolidation of health and human services agencies in 2004 and updates the sections to make them consistent with other DADS rules.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §97.2 adds definitions of "community disaster resources," "disaster," "Life Safety Code," "mitigation," "preparedness," "recovery," and "response," and updates references to the Texas Board of Nursing.

The proposed amendment to §97.244 updates references to the Texas Board of Nursing and updates the cross-references to the rule sections in new §97.259 and §97.260.

The proposed amendment to §97.256 requires an agency to have a written emergency preparedness and response plan, based on its required risk assessment, that comprehensively describes its approach to a potential emergency. The amended rule requires an agency to: (1) describe who must be involved in the creation and implementation of the plan; (2) designate an agency employee as a disaster coordinator; (3) develop a continuity of operations plan; (4) include a risk assessment; (5) describe the actions and responsibilities for agency staff in each phase of emergency planning, including mitigation, preparedness, response, and recovery; (6) develop a plan to monitor disaster-related news and information; (7) have procedures for an agency to communicate with staff, clients, state and federal agencies, including DADS, and other healthcare providers and suppliers; (8) discuss disaster-related information with clients; (9) develop procedures to release client information; (10) de-

velop procedures to triage clients; and (11) complete an internal review of the plan at least annually.

The proposed amendment to §97.292 corrects a rule cross-reference.

The proposed amendment to §97.295 corrects a rule cross-reference.

The proposed amendment to §97.298 requires an agency to comply with 22 TAC Chapter 224 (relating to Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments) and 22 TAC, Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions) and updates a reference to the Texas Board of Nursing.

The proposed amendment to §97.299 updates a reference to the Texas Board of Nursing.

The proposed amendment to §97.301 corrects a rule cross-reference.

The proposed amendment to §97.403 states that, in addition to the requirements described in §97.256, a freestanding hospice facility is required to have a written emergency preparedness and response plan that includes: (1) the core functions of direction and control; (2) communication; (3) resource management; (4) sheltering; (5) evacuation; (6) transportation; and (7) training in its written emergency preparedness and response plan. The amendment also updates rule language concerning a client's representative and updates references to the Texas Board of Nursing and DADS.

The proposed amendment to §97.404 updates references to the Texas Board of Nursing and DADS.

The proposed amendment to §97.405 updates terminology related to emergencies, medical emergencies, and emergency preparedness and updates a reference to DADS.

The proposed amendment to §97.602 updates rules references and rule language concerning severity level A and B violations and an agency's emergency preparedness plan requirements and updates a reference to the Texas Board of Nursing.

Proposed new §97.259 requires that any initial educational training obtained prior to designation as a first-time administrator or alternate administrator is obtained within the 12 months immediately preceding the date of designation to the position, allows a person to obtain the additional 16 hours of initial training prior to the date of designation, and adds that any of the additional 16 hours of initial training not on topics specified in this section must be on subjects related to the duties of an administrator.

Proposed new §97.260 adds documentation requirements for continuing education and adds that any of the 12 hours of continuing education that are not on topics specified in this section must be on subjects related to the duties of an administrator.

The proposed repeal of §97.259 deletes the existing rule as part of the reorganization of administrator training requirements.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments, new sections, and repeal are in effect, enforcing or administering the rule proposals does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the proposed amendments, because the proposal does not create new requirements, but rather expands and clarifies DADS' requirements concerning an emergency preparedness plan. The proposal will provide agencies with greater detail and clearer direction concerning emergency preparedness plan requirements and initial and continuing educational training requirements for an administrator or alternate administrator.

In addition, the public will benefit from clearer rules concerning the minimum training requirements for administrator or alternate administrator.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the proposed amendments, new sections, and repeal are in effect, the public benefit expected as a result of enforcing the rule proposals is that agencies will have clearer and easier-to-follow rules concerning emergency preparedness plan requirements. The amendments are proposed to better address the health and safety needs of clients who reside in a residence and clients admitted to or residing in a hospice facility during an emergency.

The public will also benefit from updated and clarified rules that will be more accurate and easier for the public and agencies to use and understand.

In addition, the public will benefit from updated rules concerning initial and continuing training for an administrator or alternate administrator of an agency.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the proposed amendments, new sections, and repeal. The proposed amendments, new sections, and repeal will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sylvia Trevino at (361) 878-3419 in DADS' Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-045, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing

comments, please indicate "Comments on Proposed Rule 045" in the subject line.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §97.2

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§142.001 - 142.030.

§97.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) - (4) (No change.)

(5) Advanced practice nurse--A registered nurse who is approved by the Texas Board of Nursing [~~Nurse Examiners (BNE)~~] to practice as an advanced practice nurse and who maintains compliance with the applicable rules of the Texas Board of Nursing [~~BNE~~]. See the Texas Board of Nursing's [~~BNE's~~] definition of advanced practice nurse in 22 TAC §221.1 (concerning definitions).

(6) - (25) (No change.)

(26) Community disaster resources--A local, statewide, or nationwide emergency system that provides information and resources during a disaster, including weather information, transportation, evacuation, and shelter information, disaster assistance and recovery efforts, evacuee and disaster victim resources, and resources for locating evacuated friends and relatives.

(27) [~~(26)~~] Controlling person--A person with the ability, acting alone or with others, to directly or indirectly influence, direct, or cause the direction of the management, expenditure of money, or policies of an agency or other person.

(A) A controlling person includes:

(i) a management company or other business entity that operates or contracts with others for the operation of an agency;

(ii) a person who is a controlling person of a management company or other business entity that operates an agency or that contracts with another person for the operation of an agency; and

(iii) any other individual who, because of a personal, familial, or other relationship with the owner, manager, or provider of an agency, is in a position of actual control or authority with respect to the agency, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the agency.

(B) A controlling person, as described by subparagraph (A)(iii) of this paragraph, does not include an employee, lender, secured creditor, or other person who does not exercise formal or actual influence or control over the operation of an agency.

(28) [~~(27)~~] Conviction--An adjudication of guilt based on a finding of guilt, a plea of guilty, or a plea of nolo contendere.

(29) [~~(28)~~] Counselor--An individual qualified under Medicare standards to provide counseling services, including bereavement, dietary, spiritual, and other counseling services to both the client and the family.

(30) [~~(29)~~] DADS--Department of Aging and Disability Services.

(31) [~~(30)~~] Day--Any reference to a day means a calendar day, unless otherwise specified in the text. A calendar day includes weekends and holidays.

(32) [~~(31)~~] Deficiency--A finding of noncompliance with federal requirements resulting from a survey.

(33) [~~(32)~~] Designated survey office--A DADS Home and Community Support Services Agencies Program office located in an agency's geographic region.

(34) [~~(33)~~] Dialysis treatment record--For home dialysis designation, a dated and signed written notation by the person providing dialysis treatment which contains a description of signs and symptoms, machine parameters and pressure settings, type of dialyzer and dialysate, actual pre- and post-treatment weight, medications administered as part of the treatment, and the client's response to treatment.

(35) [~~(34)~~] Dietitian--A person who is currently licensed under the laws of the State of Texas to use the title of licensed dietitian or provisional licensed dietitian, or who is a registered dietitian.

(36) Disaster--The occurrence or imminent threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or man-made cause, such as fire, flood, earthquake, wind, storm, wave action, oil spill or other water contamination, epidemic, air contamination, infestation, explosion, riot, hostile military or paramilitary action, or energy emergency. In a freestanding hospice, a disaster includes failure of the heating or cooling system, power outage, explosion, and bomb threat.

(37) [~~(35)~~] End stage renal disease (ESRD)--For home dialysis designation, the stage of renal impairment that appears irreversible and permanent and requires a regular course of dialysis or kidney transplantation to maintain life.

(38) [~~(36)~~] Freestanding hospice--An agency that provides hospice services to clients of the agency who are residing at the agency's physical location including inpatient and respite care.

(39) [~~(37)~~] Functional need--Needs of the individual that require services without regard to diagnosis or label.

(40) [~~(38)~~] Health assessment--A determination of a client's physical and mental status through inventory of systems.

(41) [~~(39)~~] Home and community support services agency--A person who provides home health, hospice, or personal assistance services for pay or other consideration in a client's residence, an independent living environment, or another appropriate location.

(42) [~~(40)~~] Home health aide--An individual working for an agency who meets at least one of the requirements for home health aides as defined in §97.701 of this chapter (relating to Home Health Aides).

(43) [~~(41)~~] Home health medication aide--A person permitted under the Health and Safety Code, Chapter 142, Subchapter B.

(44) [~~(42)~~] Home health service--The provision of one or more of the following health services required by an individual in a residence or independent living environment:

(A) nursing, including blood pressure monitoring and diabetes treatment;

(B) physical, occupational, speech, or respiratory therapy;

(C) medical social service;

(D) intravenous therapy;

(E) dialysis;

(F) service provided by unlicensed personnel under the delegation or supervision of a licensed health professional;

(G) the furnishing of medical equipment and supplies, excluding drugs and medicines; or

(H) nutritional counseling.

(45) [~~(43)~~] Hospice--A person licensed under this chapter to provide hospice services, including a person who owns or operates a residential unit or an inpatient unit.

(46) [~~(44)~~] Hospice services--Services, including services provided by unlicensed personnel under the delegation of a registered nurse or physical therapist, provided to a client or a client's family as part of a coordinated program consistent with the standards and rules adopted under this chapter. These services include palliative care for terminally ill clients and support services for clients and their families that:

(A) are available 24 hours a day, seven days a week, during the last stages of illness, during death, and during bereavement;

(B) are provided by a medically directed interdisciplinary team; and

(C) may be provided in a home, nursing facility, residential unit, or inpatient unit according to need. These services do not include inpatient care normally provided in a licensed hospital to a terminally ill person who has not elected to be a hospice client. For the purposes of this definition, the word "home" includes a person's "residence" as defined in this section.

(47) [~~(45)~~] Independent living environment--A client's residence, which may include a group home or foster home, or other settings where a client participates in activities, including school, work, or church.

(48) [~~(46)~~] Individual/family choice and control--Individuals and families who express preferences and make choices about how their support service needs are met.

(49) [~~(47)~~] Individualized service plan--A written plan prepared by the appropriate health care personnel for a client of a home and community support services agency licensed to provide personal assistance services.

(50) [~~(48)~~] Inpatient unit--A facility that provides a continuum of medical or nursing care and other hospice services to clients admitted into the unit and that is in compliance with:

(A) the conditions of participation for inpatient units adopted under Social Security Act, Title XVIII (42 United States Code §1395 et seq.); and

(B) standards adopted under this chapter.

(51) [~~(49)~~] IRoD--Informal review of deficiencies. An informal process that allows an agency to refute a deficiency or violation cited during a survey.

(52) [~~(50)~~] JCAHO--Joint Commission on Accreditation of Healthcare Organizations. An independent, nonprofit organization for standard-setting and accrediting in-home care and other areas of health care.

(53) [~~(51)~~] Licensed vocational nurse--A person who is currently licensed under Occupations Code, Chapter 301, as a licensed vocational nurse.

(54) Life Safety Code (also referred to as NFPA 101)--The Code for Safety to Life from Fire in Buildings and Structures, Standard 101, of the National Fire Protection Association (NFPA).

(55) [~~(52)~~] Manager--An employee or independent contractor responsible for providing management services to a home and community support services agency for the overall operation of a home and community support services agency including administration, staffing, or delivery of services. Examples of contracts for services that will not be considered contracts for management services include contracts solely for maintenance, laundry, or food services.

(56) [~~(53)~~] Medication administration record--A record used to document the administration of a client's medications.

(57) [~~(54)~~] Medication list--A list that includes all prescription and over-the-counter medication that a client is currently taking, including the dosage, the frequency, and the method of administration.

(58) Mitigation--An action taken to eliminate or reduce the probability of a disaster, or reduce a disaster's severity or consequences.

(59) [~~(55)~~] Notarized copy--A sworn affidavit stating that attached copies are true and correct copies of the original documents.

(60) [~~(56)~~] Nursing facility--An institution licensed as a nursing home under the Health and Safety Code, Chapter 242.

(61) [~~(57)~~] Nutritional counseling--Advising and assisting individuals or families on appropriate nutritional intake by integrating information from the nutrition assessment with information on food and other sources of nutrients and meal preparation consistent with cultural background and socioeconomic status, with the goal being health promotion, disease prevention, and nutrition education. Nutritional counseling may include the following:

(A) dialogue with the client to discuss current eating habits, exercise habits, food budget, and problems with food preparation;

(B) discussion of dietary needs to help the client understand why certain foods should be included or excluded from the client's diet and to help with adjustment to the new or revised or existing diet plan;

(C) a personalized written diet plan as ordered by the client's physician or practitioner, to include instructions for implementation;

(D) providing the client with motivation to help the client understand and appreciate the importance of the diet plan in getting and staying healthy; or

(E) working with the client or the client's family members by recommending ideas for meal planning, food budget planning, and appropriate food gifts.

(62) [~~(58)~~] Occupational therapist--A person who is currently licensed under the Occupational Therapy Practice Act, Occupations Code, Chapter 454, as an occupational therapist.

(63) [~~(59)~~] Original active client record--A record composed first-hand for a client currently receiving services.

(64) [~~(60)~~] Palliative care--Intervention services that focus primarily on the reduction or abatement of physical, psychosocial, and spiritual symptoms of a terminal illness.

(65) [~~(61)~~] Parent agency--An agency that develops and maintains administrative controls and provides supervision of branch offices and alternate delivery sites.

(66) [~~(62)~~] Parent company--A person, other than an individual, who has a direct 100% ownership interest in the owner of an agency.

(67) [~~(63)~~] Person--An individual, corporation, or association.

(68) [~~(64)~~] Personal assistance services--Routine ongoing care or services required by an individual in a residence or independent living environment that enable the individual to engage in the activities of daily living or to perform the physical functions required for independent living, including respite services. The term includes:

(A) personal care;

(B) health-related services performed under circumstances that are defined as not constituting the practice of professional nursing by the Texas Board of Nursing [~~Nurse Examiners~~] through a memorandum of understanding with DADS in accordance with Health and Safety Code, §142.016; and

(C) health-related tasks provided by unlicensed personnel under the delegation of a registered nurse or that a registered nurse determines do not require delegation.

(69) [~~(65)~~] Personal care--The provision of one or more of the following services required by an individual in a residence or independent living environment:

(A) bathing;

(B) dressing;

(C) grooming;

(D) feeding;

(E) exercising;

(F) toileting;

(G) positioning;

(H) assisting with self-administered medications;

(I) routine hair and skin care; and

(J) transfer or ambulation.

(70) [~~(66)~~] Physical therapist--A person who is currently licensed under Occupations Code, Chapter 453, as a physical therapist.

(71) [~~(67)~~] Physician--A person who holds a doctor of medicine or doctor of osteopathy degree and is currently licensed and practicing medicine under the laws of the state of Texas, Oklahoma, New Mexico, Arkansas, or Louisiana.

(72) [~~(68)~~] Physician assistant--A person who is licensed under the Physician Assistant Licensing Act, Occupations Code, Chapter 204, as a physician assistant.

(73) [~~(69)~~] Physician-delegated task--A task performed in accordance with the Occupations Code, Chapter 157, including orders signed by a physician that specify the delegated task, the individual to whom the task is delegated, and the client's name.

(74) [~~(70)~~] Place of business--An office of a home and community support services agency that maintains client records or directs home health, hospice, or personal assistance services. This term includes a parent agency, a branch office, and an alternate delivery site. The term does not include an administrative support site.

(75) [~~(71)~~] Plan of care--The written orders of a practitioner for a client who requires skilled services.

(76) [~~(72)~~] Practitioner--A person who is currently licensed in a state in which the person practices as a physician, dentist, podiatrist, or a physician assistant, or a person who is a registered nurse registered with the Texas Board of Nursing [~~Nurse Examiners for the State of Texas~~] as an advanced practice nurse.

(77) Preparedness--Actions taken in anticipation of a disaster.

(78) [~~(73)~~] Presurvey conference--A conference held with DADS staff and the applicant or the applicant's representatives to review licensure standards and survey documents, and to provide consultation before the survey.

(79) [~~(74)~~] Progress note--A dated and signed written notation by agency personnel summarizing facts about care and the client's response during a given period of time.

(80) [~~(75)~~] Psychoactive treatment--The provision of a skilled nursing visit to a client with a psychiatric diagnosis under the direction of a physician that includes one or more of the following:

(A) assessment of alterations in mental status or evidence of suicide ideation or tendencies;

(B) teaching coping mechanisms or skills;

(C) counseling activities; or

(D) evaluation of the plan of care.

(81) Recovery--Activities implemented during and after a disaster response designed to return an agency to its normal operations as quickly as possible.

(82) [~~(76)~~] Registered nurse (RN)--A person who is currently licensed under the Nursing Practice Act, Occupations Code, Chapter 301, as a registered nurse.

(83) [~~(77)~~] Registered nurse delegation--Delegation by a registered nurse in accordance with:

(A) 22 TAC, Chapter 224 (concerning Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments); and

(B) 22 TAC, Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).

(84) [~~(78)~~] Residence--A place where a person resides, including a home, a nursing facility, a convalescent home, or a residential unit.

(85) [~~(79)~~] Residential unit--A facility that provides living quarters and hospice services to clients admitted into the unit and that is in compliance with standards adopted under the Health and Safety Code, Chapter 142.

(86) [~~(80)~~] Respiratory therapist--A person who is currently licensed under Occupations Code, Chapter 604, as a respiratory care practitioner.

(87) [~~(81)~~] Respite services--Support options that are provided temporarily for the purpose of relief for a primary caregiver in providing care to individuals of all ages with disabilities or at risk of abuse or neglect.

(88) Response--Actions taken immediately before an impending disaster or during and after a disaster to address the immediate and short-term effects of the disaster.

(89) [~~(82)~~] Section--A reference to a specific rule in this chapter.

(90) [~~(83)~~] Service area--A geographic area established by an agency in which all or some of the agency's services are available.

(91) [~~(84)~~] Skilled services--Services in accordance with a plan of care that require the skills of:

(A) a registered nurse;

(B) a licensed vocational nurse;

(C) a physical therapist;

(D) an occupational therapist;

(E) a respiratory therapist;

(F) a speech-language pathologist;

(G) an audiologist;

(H) a social worker; or

(I) a dietitian.

(92) [~~(85)~~] Social worker--A person who is currently licensed as a social worker under Occupations Code, Chapter 505.

(93) [~~(86)~~] Speech-language pathologist--A person who is currently licensed as a speech-language pathologist under Occupations Code, Chapter 401.

(94) [~~(87)~~] Statute--The Health and Safety Code, Chapter 142.

(95) [~~(88)~~] Substantial compliance--A finding in which an agency receives no recommendation for enforcement action after a survey.

(96) [~~(89)~~] Supervising nurse--The person responsible for supervising skilled services provided by an agency and who has the qualifications described in §97.244(c) of this chapter (relating to Administrator Qualifications and Conditions and Supervising Nurse Qualifications). This person may also be known as the director of nursing or similar title.

(97) [~~(90)~~] Supervision--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity with initial direction and periodic inspection of the actual act of accomplishing the function or activity.

(98) [~~(91)~~] Support services--Social, spiritual, and emotional care provided to a client and a client's family by a hospice.

(99) [~~(92)~~] Survey--An on-site inspection or complaint investigation conducted by a DADS representative to determine if an agency is in compliance with the statute and this chapter or in compliance with applicable federal requirements or both.

(100) [~~(93)~~] Terminal illness--An illness for which there is a limited prognosis if the illness runs its usual course.

(101) [~~(94)~~] Unlicensed person--An individual who is not licensed as a health care professional. The term includes home health aides, medication aides permitted by DADS, and other individuals providing personal care or assistance in health services.

(102) [~~(95)~~] Unsatisfied judgments--A failure to fully carry out the terms or meet the obligation of a court's final disposition on the matters before it in a suit regarding the operation of an agency.

(103) [~~(96)~~] Violation--A finding of noncompliance with this chapter or the statute resulting from a survey.

(104) [~~(97)~~] Volunteer--An individual who provides assistance to a home and community support services agency without compensation other than reimbursement for actual expenses.

(105) [~~(98)~~] Working day--Any day except Saturday, Sunday, a state holiday, or a federal holiday.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 8, 2007.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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SUBCHAPTER C. MINIMUM STANDARDS FOR ALL HOME AND COMMUNITY SUPPORT SERVICES AGENCIES
DIVISION 3. AGENCY ADMINISTRATION

40 TAC §§97.244, 97.256, 97.259, 97.260

STATUTORY AUTHORITY

The amendments and new sections are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The amendments and new sections implement Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§142.001 - 142.030.

§97.244. Administrator Qualifications and Conditions and Supervising Nurse Qualifications.

(a) Administrator qualifications. [~~An administrator and alternate administrator must meet the qualifications and conditions of this section before being designated as the administrator or alternate administrator.~~]

(1) - (2) (No change.)

(b) Administrator conditions.

(1) (No change.)

(2) An administrator and alternate administrator designated as an administrator or alternate administrator for the first time on or after December 1, 2006, must meet the initial educational training requirements specified [~~on the administration of an agency~~] in §97.259 of this chapter (relating to Initial Educational Training in Administration of Agencies).

(3) An administrator and alternate administrator designated as an administrator or alternate administrator before December 1, 2006, must meet the continuing education requirements specified in §97.260 of this chapter (relating to Continuing Education in Administration of Agencies).

(4) [~~(3)~~] A person is not eligible to be the administrator or alternate administrator of any agency if the person was the administrator of an agency cited with a violation that resulted in DADS taking enforcement action against the agency while the person was the administrator of the cited agency.

(A) This paragraph applies for 12 months after the date of the enforcement action.

(B) For purposes of this paragraph, enforcement action means license revocation, suspension, emergency suspension of a license, denial of an application for a license, or the imposition of an injunction but does not include administrative or civil penalties.

(C) If DADS prevails in one enforcement action against the agency and also proceeds with, but does not prevail in, another enforcement action based on some or all of the same violations, this paragraph does not apply.

(5) [~~(4)~~] An administrator and alternate administrator must not be convicted of a crime, offense, or misdemeanor as defined in §97.241(b) of this chapter (relating to Management).

(c) Supervising nurse qualifications.

(1) For an agency without a home dialysis designation, a supervising nurse and alternate supervising nurse must each:

(A) be a registered nurse (RN) licensed in Texas or in accordance with the Texas Board of Nursing [~~Nurse Examiners~~] rules for Nurse Licensure Compact (NLC); and

(B) (No change.)

(2) For an agency with home dialysis designation, a supervising nurse and alternate supervising nurse must each:

(A) be an RN licensed in Texas or in accordance with the Texas Board of Nursing [~~Nurse Examiners~~] rules for NLC, and:

(i) - (ii) (No change.)

(B) (No change.)

§97.256. Emergency [~~Natural Disaster~~] Preparedness Planning and Implementation.

An agency must have a written emergency preparedness and response plan, based on its risk assessment required by paragraph (1)(C) of this section, that comprehensively describes its approach to a disaster that could affect the need for its services or its ability to provide those services. An agency must maintain documentation of compliance with this section. With the exception of a freestanding hospice, DADS does not require an agency to physically evacuate or transport a client. [~~The agency must adopt and enforce a written policy that includes a plan for publicly known natural disaster preparedness for clients receiving services. The written policy must include a plan for the reasonable mechanism for triaging clients; the notification of appropriate personnel and clients in the event of a disaster, if possible; the identification of appropriate community resources; and the identification of possible evacuation procedures. The plan need not require that the agency actually evacuate, transport, or triage the clients.~~]

(1) An agency must take the following action to develop, maintain, and implement an emergency preparedness and response plan:

(A) An agency must involve the administrator, supervising nurse if applicable, and, based on the agency's organizational chart, other agency leaders designated by the administrator.

(B) An agency must designate an employee by name and title, and at least one alternate by title, to act as the agency's disaster coordinator.

(C) An agency must develop a continuity of operations business plan to address emergency financial needs, essential functions for client services, critical personnel, and how to return to normal operations as quickly as possible.

(D) An agency must include a risk assessment to identify the potential disasters from natural and man-made causes most likely to occur in the agency's service area.

(E) An agency must describe the actions and responsibilities for agency staff in each phase of emergency planning, including mitigation, preparedness, response, and recovery. In the response and recovery phases, include actions and responsibilities when warning of an emergency is not provided.

(F) An agency must develop a plan to monitor disaster-related news and information, including after hours, weekends, and holidays, to receive warnings of imminent and occurring disasters.

(G) An agency must describe the following for the response and recovery phases of the plan:

(i) who at the agency will initiate each phase;

(ii) procedures for communicating with:

(I) staff;

(II) clients or someone responsible for a client's emergency response plan;

(III) local, state, and federal emergency management agencies; and

(IV) other entities as applicable, including:

(-a-) DADS;

(-b-) emergency medical services; and

(-c-) other healthcare providers and suppliers; and

(iii) a primary mode of communication and alternate communication or alert systems in the event of telephone or power failure.

(H) An agency must provide the following information and discuss it with each client as part of the agency's written client care policies on how to handle emergencies in the home related to a disaster:

(i) the actions and responsibilities of agency staff during and immediately following an emergency;

(ii) the client's responsibilities in the agency's emergency preparedness and response plan in accordance with §97.282 of this chapter (relating to Client Conduct and Responsibility and Client Rights);

(iii) a list of community disaster resources that can assist a client during a disaster-related emergency, such as those provided by DADS and local, state, and federal emergency management agencies, including the special needs registry maintained by the state; and

(iv) materials that describe survival tips and plans for evacuation and sheltering in place.

(I) An agency must develop procedures in accordance with §97.301(a)(2) of this chapter (relating to Client Records) to release client information as allowed by law in the event of a disaster-related emergency.

(J) An agency must develop procedures to triage clients that allow the agency to:

(i) categorize clients into groups based on the following:

(I) the services provided by the agency;

(II) the need for continuity of services provided by the agency; and

(III) the availability of someone to assume responsibility for a client's emergency response plan if needed by the client;

(ii) identify a client who may need evacuation assistance from local or state jurisdictions;

(iii) readily access recorded information about a client's triage category in the event of an emergency to coordinate and communicate as required by subparagraph (H) of this paragraph to implement the agency's response and recovery phases.

(K) An agency must develop and implement procedures as part of the agency's staffing policies to orient and train employees, volunteers, and contractors about their responsibilities in the agency's emergency preparedness and response plan.

(L) An agency must complete an internal review of the plan at least annually, and after each actual emergency response, to evaluate its effectiveness and to update the plan as needed.

(M) As part of the annual internal review, an agency must test the response phase of the emergency preparedness and response plan in a planned drill if not tested during an actual emergency response. Except for a freestanding hospice, a planned drill can be limited to the agency's procedures for communicating with staff.

(2) An agency must make a good faith effort to comply with the requirements of this section during a disaster. If the agency is unable to comply with any of the requirements of this section, it must document in the agency's records attempts of staff to follow procedures outlined in the agency's emergency preparedness and response plan.

(3) An agency is not required to continue to provide care to clients in emergency situations that are beyond the agency's control and that make it impossible to provide services, such as when roads are impassable or when a client relocates to a place unknown to the agency. An agency may establish links to local emergency operations centers to determine a mechanism by which to approach specific areas within a disaster area in order for the agency to reach its clients.

(4) If written records are damaged during a disaster, the agency must not reproduce or recreate client records except from existing electronic records. Records reproduced from existing electronic records must include:

(A) the date the record was reproduced;

(B) the agency staff member who reproduced the record; and

(C) how the original record was damaged.

(5) Notwithstanding the provisions specified in Division 2 of this subchapter (relating to Conditions of a License), an agency must notify and provide the following information to the DADS Home and Community Support Services Agencies licensing unit no later than five working days after any of the following temporary changes resulting from the effects of an emergency or disaster. The notice and information must be submitted by fax or e-mail. If fax and e-mail are unavailable, notifications can be provided by telephone, but must be provided in writing as soon as possible. If communication with the DADS licensing unit is not possible, an agency may fax, e-mail, or telephone the designated survey office to provide notification.

(A) If temporarily relocating a place of business, the agency must provide DADS with:

(i) the license number for the place of business and the date of temporary relocation;

(ii) the physical address and phone number of the temporary location; and

(iii) the date an agency returns to a place of business after temporary relocation.

(B) If temporarily expanding the service area to provide services during a disaster, the agency must provide DADS with:

(i) the license number and revised boundaries of the original service area;

(ii) the date of temporary expansion; and

(iii) the date an agency's temporary expansion of its service area ends.

§97.259. Initial Educational Training in Administration of Agencies.

(a) This section applies only to an administrator and alternate administrator designated as an administrator or alternate administrator for the first time on or after December 1, 2006.

(b) In addition to the qualifications and conditions described in §97.244 of this division (relating to Administrator Qualifications and Conditions and Supervising Nurse Qualifications), a first-time administrator and alternate administrator of an agency must each complete a total of 24 clock hours of educational training in the administration of an agency before the end of the first 12 months after designation to the position.

(c) Prior to designation, a first-time administrator or alternate administrator must complete eight clock hours of educational training in the administration of an agency. The initial eight clock hours must be completed during the 12 months immediately preceding the date of designation to the position. The initial eight clock hours must include:

(1) information on the licensing standards for an agency; and

(2) information on the state and federal laws applicable to an agency, including:

(A) the Texas Health and Safety Code, Chapter 142, Home and Community Support Services, and Chapter 250, Nurse Aide Registry and Criminal History Checks of Employees and Applicants for Employment in Certain Facilities Serving the Elderly or Persons with Disabilities;

(B) the Texas Human Resources Code, Chapter 102, Rights of the Elderly;

(C) the Americans with Disabilities Act;

(D) the Civil Rights Act of 1991;

(E) the Rehabilitation Act of 1993;

(F) the Family and Medical Leave Act of 1993; and

(G) the Occupational Safety and Health Administration requirements.

(d) A first-time administrator and alternate administrator must complete an additional 16 clock hours of educational training before the end of the first 12 months after designation to the position. Any of the additional 16 clock hours may be completed prior to designation if completed during the 12 months immediately preceding the date of designation to the position. The additional 16 clock hours must include the following subjects and may include other topics related to the duties of an administrator:

(1) information regarding fraud and abuse detection and prevention;

(2) legal issues regarding advance directives;

(3) client rights, including the right to confidentiality;

(4) agency responsibilities;

(5) complaint investigation and resolution;

(6) emergency preparedness planning and implementation;

(7) abuse, neglect, and exploitation;

(8) infection control;

(9) nutrition (for agencies licensed to provide inpatient hospice services); and

(10) the Outcome and Assessment Information Set (OASIS) (for agencies licensed to provide licensed and certified home health services).

(e) The 24-hour educational training requirement described in subsection (b) of this section must be met through structured, formalized classes, correspondence courses, competency-based computer courses, training videos, distance learning programs, or off-site training courses. Subject matter that deals with the internal affairs of an organization does not qualify for credit.

(1) The training must be provided or produced by:

(A) an academic institution;

(B) a recognized state or national organization or association;

(C) an independent contractor who consults with agencies; or

(D) an agency.

(2) If an agency or independent contractor provides or produces the training, the training must be approved by DADS or recognized by a state or national organization or association. The agency must maintain documentation of this approval for review by DADS surveyors.

(f) Documentation of administrator and alternate administrator training must:

(1) be on file at the agency; and

(2) contain the name of the class or workshop, the course content (such as the curriculum), the hours and dates of the training, and the name and contact information of the entity and trainer who provided the training.

(g) A first-time administrator and alternate administrator must not apply a pre-survey conference toward the 24 hours of educational training required in this section.

(h) After completing the 24 hours of educational training within the first 12 months after designation as a first-time administrator and alternate administrator, an administrator and alternate administrator must then complete the continuing education requirements as specified in §97.260 of this division (relating to Continuing Education in Administration of Agencies) in each subsequent 12-month period after designation.

§97.260. Continuing Education in Administration of Agencies.

(a) In addition to the qualifications and conditions described in §97.244 of this division (relating to Administrator Qualifications and Conditions and Supervising Nurse Qualifications), an administrator and alternate administrator must complete 12 clock hours of continuing education within each 12-month period beginning with the date of designation. The 12 clock hours of continuing education must include at least two of the following topics and may include other topics related to the duties of an administrator:

(1) any one of the educational training subjects listed in §97.259(d) of this division (relating to Initial Educational Training in Administration of Agencies);

(2) development and interpretation of agency policies;

(3) basic principles of management in a licensed health-related setting;

(4) ethics;

(5) quality improvement;

(6) risk assessment and management;

(7) financial management;

(8) skills for working with clients, families, and other professional service providers;

(9) community resources; or

(10) marketing.

(b) This subsection applies only to an agency administrator or alternate administrator designated as an agency administrator or alternate administrator before December 1, 2006, who has not served as an administrator or alternate administrator for 180 days or more immediately preceding the date of designation. Within the first 12 months after the date of designation, at least eight of the 12 clock hours of continuing education must include the topics listed in §97.259(c) of this division. The remaining fours hours of continuing education must include topics related to the duties of an administrator and may include the topics listed in subsection (a) of this section.

(c) Documentation of administrator and alternate administrator continuing education must:

(1) be on file at the agency; and

(2) contain the name of the class or workshop, the topics covered, and the hours and dates of the training.

(d) An administrator or alternate administrator must not apply the pre-survey conference toward the continuing education requirements in this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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For further information, please call: (512) 438-3734

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40 TAC §97.259

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Department of Aging and Disability Services or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

STATUTORY AUTHORITY

The repeal is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The repeal implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§142.001 - 142.030.

§97.259. Training in Administration of Agencies.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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DIVISION 4. PROVISION AND COORDINATION OF TREATMENT AND SERVICES

40 TAC §§97.292, 97.295, 97.298, 97.299, 97.301

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The proposed amendments implement Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§142.001 - 142.030.

§97.292. Agency and Client Agreement and Disclosure.

(a) The agency must provide the client or the client's family with a written agreement for services. The agency must comply with the terms of the agreement. The agreement must include at a minimum the following:

(1) - (5) (No change.)

(6) a written statement containing procedures for filing a complaint in accordance with §97.282(d) [~~§97.282(11)~~] of this chapter [~~title~~] (relating to Client Conduct and Responsibility and Client Rights); and

(7) (No change.)

(b) (No change.)

§97.295. Client Transfer or Discharge Notification Requirements.

(a) - (d) (No change.)

(e) An agency may transfer or discharge a client without prior notice required by subsection (b) of this section:

(1) - (2) (No change.)

(3) in the event of a [~~natural~~] disaster when the client's health and safety is at risk in accordance with provisions of §97.256 of this chapter (relating to Emergency [~~Natural Disaster~~] Preparedness Planning and Implementation);

(4) - (6) (No change.)

(f) (No change.)

§97.298. Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel and Tasks Not Requiring Delegation.

(a) An agency must adopt and enforce a written policy to ensure compliance with the following rules adopted by the Texas Board of Nursing [~~Nurse Examiners for the State of Texas~~]:

(1) 22 TAC, Chapter 224 (relating to Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments); and

(2) 22 TAC, Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).

(b) (No change.)

§97.299. Nursing Education, Licensure and Practice.

If providing nursing services, an agency must adopt and enforce a written policy to ensure compliance with the rules of the Texas Board of Nursing [~~Nurse Examiners~~] adopted at 22 TAC Chapters 211 - 226 (relating to Nursing Continuing Education, Licensure, and Practice in the State of Texas).

§97.301. Client Records.

(a) In accordance with accepted principles of practice, an agency must establish and maintain a client record system to ensure that the care and services provided to each client are completely and accurately documented, readily accessible and systematically organized to facilitate the compilation and retrieval of information.

(1) - (8) (No change.)

(9) Each client record must include the following elements as applicable to the scope of services provided by the agency:

(A) - (B) (No change.)

(C) care plan, plan of care, or individualized service plan, as applicable. The care plan or the plan of care must include, as applicable, medication, dietary, treatment, and activities orders. The requirements for the individualized service plan for personal assistance service clients are located in §97.404 of this chapter [~~title~~] (relating to Standards Specific to Agencies Licensed to Provide Personal Assistance Services). The requirements for the plan of care for hospice clients are located in §97.403 of this chapter [~~title~~] (relating to Standards Specific to Agencies Licensed to Provide Hospice Services);

(D) - (G) (No change.)

(H) complete documentation of all known services and significant events. Documentation must show that effective interchange, reporting, and coordination of care occurs as required in §97.288 of this chapter [~~title~~] (relating to Coordination of Services);

(I) - (J) (No change.)

(K) documentation that the client has been informed of how to register a complaint in accordance with §97.282(d) [~~§97.282(11)~~] of this chapter [~~title~~] (relating to Client Conduct and Responsibility and client Rights);

(L) (No change.)

(M) discharge summary, including the reason for discharge or transfer and the agency's documented notice to the client, the client's physician (if applicable), and other individuals as required in §97.295 of this chapter [~~title~~] (relating to Client Transfer or Discharge Notification Requirements);

(N) - (P) (No change.)

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER D. ADDITIONAL STANDARDS SPECIFIC TO LICENSE CATEGORY AND SPECIFIC TO SPECIAL SERVICES

40 TAC §§97.403 - 97.405

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The amendments implement Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§142.001 - 142.030.

§97.403. Standards Specific to Agencies Licensed to Provide Hospice Services.

(a) - (f) (No change.)

(g) Prior to the start of care, the hospice physician or registered nurse must make an initial health assessment visit to determine the immediate care and support needs of the client.

(1) The hospice physician or registered nurse must contact the client or client's representative [~~other~~] within 24 hours of receiving the physician's referral for hospice care to schedule an appointment for the initial health assessment.

(2) - (3) (No change.)

(h) - (t) (No change.)

(u) Medical supplies and appliances, including medications, must be provided as needed for the palliation and management of the terminal illness and related conditions.

(1) - (2) (No change.)

(3) Medications must be administered only by the following individuals:

(A) - (C) (No change.)

(D) another individual acting in accordance with applicable federal and state laws, or as specified in the rules adopted by the Texas Board of Nursing [~~Nurse Examiners (BNE)~~] in:

(i) - (ii) (No change.)

(4) (No change.)

(v) (No change.)

(w) A freestanding hospice that provides inpatient care directly must comply with the following standards in addition to the standards in subsections (a) - (v) of this section.

(1) (No change.)

(2) In addition to §97.256 of this chapter (relating to Emergency Preparedness Planning and Implementation), a freestanding hospice facility must address the following core functions of emergency management in its written emergency preparedness and response plan: direction and control, communication, resource management, sheltering in place, evacuation, transportation, and training. The facility must maintain documentation of compliance with this paragraph.

(A) The portion of the plan on direction and control must:

(i) designate a person by position, and at least one alternate, to be in charge during implementation of an emergency response plan, with authority to execute a plan to evacuate or shelter in place;

(ii) include procedures the facility will use to maintain continuous leadership and authority in key positions;

(iii) include procedures the facility will use to activate a timely response plan based on the types of disasters identified in the risk assessment;

(iv) include procedures the facility will use to meet staffing requirements;

(v) include procedures the facility will use to warn or notify facility staff about internal and external disasters, including during off hours, weekends, and holidays;

(vi) include procedures the facility will use to maintain a current list of who the hospice will notify once warning of a disaster is received;

(vii) include procedures the facility will use to alert critical facility personnel once a disaster is identified; and

(viii) include procedures the facility will use to maintain a current 24-hour contact list for all staff.

(B) The portion of the plan on communication must include procedures:

(i) for continued communication, including procedures to maintain contact during an evacuation, with critical personnel and with all vehicles traveling in an evacuation caravan;

(ii) to maintain an accessible, current list of the phone numbers of client family members, local shelters, prearranged receiving facilities, the local emergency management coordinator, emergency medical services, other healthcare providers, and local, state, and federal emergency management agencies;

(iii) to notify staff, clients, families of clients, families of critical staff, prearranged receiving facilities, and others of an evacuation or the plan to shelter in place;

(iv) to provide a contact number for out-of-town family members to call for information; and

(v) to use the web-based system designed for facilities regulated by DADS to help each other relocate and track clients during disasters that require mass evacuations.

(C) The portion of the plan on resource management must include procedures:

(i) to maintain contracts and agreements with multiple vendors for supplies and transportation;

(ii) to develop accurate, detailed, and current checklists of essential supplies, staff, equipment, and medications;

(iii) to designate responsibility for completing the checklists during disaster operations;

(iv) for the safe and secure transportation of adequate amounts of food, water, medications, and critical supplies and equipment during an evacuation; and

(v) to maintain a supply of sufficient resources for at least seven days to shelter in place, which must include:

(I) emergency power, including backup generators and accounts for maintaining a supply of fuel;

(II) potable water in an amount based on population and location;

(III) the types and amounts of food for the number and types of clients served;

(IV) extra pharmacy stocks of common medications; and

(V) extra medical supplies and equipment, such as oxygen, linens, and any other vital equipment.

(D) The portion of the plan on sheltering in place must:

(i) be developed using information about the building's construction and Life Safety Code systems;

(ii) describe the criteria to be used to decide whether to shelter in place versus evacuate;

(iii) include procedures to assess whether the building is strong enough to withstand the various types of possible disasters and to identify the safest areas of the building;

(iv) include procedures to secure the building against damage;

(v) include procedures for collaborating with the local emergency management agency, fire, police, and emergency management system (EMS) agencies regarding the decision to shelter in place;

(vi) include procedures to assign each task in the sheltering plan to facility staff;

(vii) describe procedures to shelter in place that allow the facility to maintain 24-hour operations for a minimum of seven days to maintain continuity of care for the number and types of clients served; and

(viii) include procedures to provide for building security.

(E) The portion of the plan on evacuation must:

(i) include contracts with prearranged receiving facilities to provide hospice in-patient care, with at least one facility located at least 50 miles away;

(ii) include procedures to identify and follow evacuation and alternative routes, and to notify the proper authorities of the decision to evacuate;

(iii) include procedures to protect and transport client records and to match them to each client;

(iv) include procedures to maintain a checklist of items to be transported with clients, including medications and assistive devices, and how the items will be matched to each client;

(v) include staffing procedures the facility will use to ensure that staff accompany evacuating clients;

(vi) include procedures to identify and assign staff responsibilities, including how clients will be cared for during evacuations, and a backup plan for lack of sufficient staff;

(vii) include procedures facility staff will use to account for all individuals in the building during the evacuation and to track all individuals evacuated;

(viii) include procedures for the use, protection, and security of the identifying information the facility will use to identify evacuated clients;

(ix) include procedures facility staff will follow if a client becomes ill or dies in route;

(x) include procedures to make a hospice counselor available to counsel evacuees;

(xi) include the facility's policy on whether family of staff and clients can shelter at the hospice and evacuate with staff and clients;

(xii) include procedures to coordinate building security with the local emergency management agency;

(xiii) include procedures facility staff will use to determine when it is safe to return to the geographical area;

(xiv) include procedures facility staff will use to determine if the building is safe for reoccupation; and

(xv) be approved by the local emergency management coordinator at least annually and when updated.

(F) The portion of the plan on transportation must:

(i) include procedures for using the facility's own vehicles or contracts with transportation vendors to provide suitable transportation for the type and number of clients being served;

(ii) require contracted transportation vendors to provide written statements that describe how the vendors plan to fulfill their commitments in case of a disaster;

(iii) include a backup plan facility staff will use in the event that the first transportation vendor overextended itself or does not show up; and

(iv) include procedures to coordinate the facility's transportation needs with the local emergency management coordinator.

(G) The portion of the plan on training must include:

(i) procedures that specify when and how the disaster response plan is reviewed with clients and family members;

(ii) procedures to review the role and responsibility of a client able to participate with the plan;

(iii) procedures for initial and periodic training for all facility staff to carry out the plan;

(iv) the frequency for conducting disaster drills and demonstrations to ensure staff are fully trained with respect to their duties under the plan; and

(v) procedures to conduct emergency response drills at least annually either in response to an actual disaster or in a planned drill, which may be in addition to, or combined with, the drills required by the Life Safety Code as specified in paragraph (4) of this subsection.

[~~(2) The hospice must have a written plan, periodically rehearsed with staff, with procedures to be followed in the event of an internal or external disaster and for the care of casualties (clients and personnel) arising from such disasters.~~]

(3) (No change.)

(4) Except as provided in this subsection, the hospice must meet National Fire Protection Association 101, Life Safety Code, 2000 Edition (NFPA 101), Chapter 18 (concerning new health care occupancies) and Chapter 19 (concerning existing health care occupancies), published by the National Fire Protection Association (NFPA). All documents published by the NFPA as referenced in this subsection may be obtained by writing the National Fire Protection Association, 1 Batterymarch Park, Quincy, Massachusetts 02169, or calling 1-800-344-3555.

(A) DADS [~~The Texas Department of Human Services (DHS)~~] recognizes the Centers for Medicare & Medicaid Services (CMS) waiver of specific provisions of the NFPA 101 required by this paragraph for a certified hospice for as long as CMS honors the waiver, if the waiver would not adversely affect the health and safety of the clients and rigid application of specific provisions of the NFPA 101 would result in unreasonable hardship for the hospice. DADS [~~DHS~~] may waive specific provisions of the NFPA 101 for a licensed hospice, if the waiver would not adversely affect the health and safety of the clients; and rigid application of specific provisions of the NFPA 101 would result in unreasonable hardship for the hospice.

(B) (No change.)

(5) - (6) (No change.)

(7) For an existing building, DADS [~~DHS~~] recognizes the CMS waiver for the space and occupancy requirements of paragraph (6)(E) and (F) of this subsection for a certified hospice for as long as CMS honors the waiver, if DADS [~~DHS~~] finds that the requirements would result in unreasonable hardship on the hospice if strictly enforced, and the waiver serves the particular needs of the clients and does not adversely affect their health and safety. For an existing building, DADS [~~DHS~~] may waive the space and occupancy requirements of paragraph (6)(E) and (F) of this subsection for a licensed hospice for as long as it is considered appropriate, if it finds that the requirements would result in unreasonable hardship on the hospice if strictly enforced and the waiver serves the particular needs of the clients and does not adversely affect their health and safety.

(8) - (11) (No change.)

(12) The hospice must provide appropriate methods and procedures for dispensing and administering medications. Whether medications are obtained from community or institutional pharmacists or stocked by the facility, the facility must be responsible for medications for its clients, insofar as they are covered under the program, and for ensuring that pharmaceutical services are provided in accordance with accepted professional principles and appropriate federal and state laws.

(A) - (D) (No change.)

(E) Medications must be administered only by one of the following individuals:

(i) (No change.)

(ii) a permitted home health medication aide or an employee as specified in the rules adopted by the Texas Board of Nursing [~~BNE~~] in:

(I) - (II) (No change.)

(iii) (No change.)

(F) - (I) (No change.)

§97.404. Standards Specific to Agencies Licensed to Provide Personal Assistance Services.

(a) - (c) (No change.)

(d) The following tasks may be performed under a personal assistance services category:

(1) (No change.)

(2) health-related tasks provided by unlicensed personnel that may be delegated by an RN or that an RN determines do not require delegation in accordance with the agency's written policy adopted, implemented, and enforced to ensure compliance with the rules adopted by the Texas Board of Nursing [~~Nurse Examiners (BNE) for the State of Texas~~] in 22 TAC, Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions);

(3) health-related tasks that are not the practice of professional nursing under the memorandum of understanding between DADS [~~the Texas Department of Human Services (DHS)~~] and the Texas Board of Nursing [~~BNE~~]; and

(4) (No change.)

(e) - (f) (No change.)

(g) In addition to the written policies required by §97.245 of this chapter (relating to Staffing Policies) the agency must adopt and enforce a written policy addressing the supervision of personnel with input from the client or family on the frequency of supervision.

(1) Supervision of personnel must be in accordance with the agency's policies and applicable state laws and rules, including rules adopted by the Texas Board of Nursing [~~BNE~~] in 22 TAC, Chapter 225.

(2) (No change.)

(3) The client in a client managed attendant care program funded by DADS [~~DHS~~] or the Department of Assistive and Rehabilitative Services [~~Texas Rehabilitation Commission~~] is not required to meet the standard in paragraph (2) of this subsection.

(h) (No change.)

§97.405. Standards Specific to Agencies Licensed to Provide Home Dialysis Services.

(a) - (d) (No change.)

(e) Provision of services. An agency that provides home staff-assisted dialysis must, at a minimum, provide nursing services, nutritional counseling, and medical social service. These services must be provided as necessary and as appropriate at the client's home, by telephone, or by a client's visit to a licensed ESRD facility in accordance with this subsection. The use of dialysis technicians in home dialysis is prohibited.

(1) Nursing services.

(A) (No change.)

(B) Dialysis services must be supervised by an RN who meets the qualifications for a supervising nurse as set out in §97.244(c)(2) [~~§97.244(b)(3)~~] of this title (relating to Staffing Qualifications).

(C) (No change.)

(2) Nutritional counseling. A dietitian who meets the qualifications of this paragraph must be employed by or under contract with the agency to provide services. A qualified dietitian must meet the definition of dietitian in §97.2 of this chapter [~~title~~] (relating to Definitions) and have at least one year of experience in clinical nutrition after obtaining eligibility for registration by the American Dietetic Association, Commission on Dietetic Registration.

(3) (No change.)

(f) Orientation, skills education, and evaluation.

(1) All personnel providing dialysis in the home must receive orientation and skills education and demonstrate knowledge of the following:

(A) - (Q) (No change.)

(R) water treatment to include:

(i) standards for treatment of water used for dialysis as described in §3.2.1 (Hemodialysis Systems) and §3.2.2 (Maximum Level of Chemical Contaminants) of the American National Standard, Hemodialysis Systems, March 1992 Edition, published by the Association for the Advancement of Medical Instrumentation (AAMI), 3330 Washington Boulevard, Suite 500, Arlington, Virginia 22201. Copies of the standards are indexed and filed in the [~~Texas~~] Department of Aging and Disability [~~Human~~] Services, 701 W. 51st Street, Austin, Texas 78751-2321, and are available for public inspection during regular working hours;

(ii) - (iv) (No change.)

(2) (No change.)

(g) - (j) (No change.)

(k) Testing for hepatitis B. An agency must conduct routine testing of home dialysis clients and agency employees to ensure detection of hepatitis B in employees and clients.

(1) An agency must offer hepatitis B vaccination to previously unvaccinated, susceptible new staff members in accordance with 29 Code of Federal Regulations, §1910.1030(f)(1) - (2) (Bloodborne Pathogens).

(A) - (B) (No change.)

(C) An agency must establish, implement, and enforce a policy for repeated serologic screening of staff. The repeated serologic screening must be based on each staff member's HBsAg/antibody to HBsAg (anti-HBs), and must be congruent with Appendices i and ii of the National Surveillance of Dialysis Associated Disease in the United States, 1993, published by the United States Department of Health and Human Services (USDHHS). This document may be obtained by writing the Home and Community Support Services Program, [~~Texas~~] Department of Aging and Disability [~~Human~~] Services, 701 W. 51st Street, Austin, Texas 78751-2321 or calling 438-3011 or writing the United States Department of Health and Human Services at the Public Health Service, Centers for Disease Control and Prevention, National Center for Infectious Diseases, Hospital Infection Program, Mail Stop C01, Atlanta, Georgia 30333, or calling 404-639-2318.

(2) (No change.)

(l) - (r) (No change.)

(s) Client records. In addition to the applicable information described in §97.301(a)(9) of this chapter [~~title~~] (relating to Client Records), records of home staff assisted dialysis clients must include the following:

(1) - (7) (No change.)

(t) Water treatment.

(1) Water used for dialysis purposes must be analyzed for chemical contaminants every six months. Additional chemical analysis must be conducted if test results exceed the maximum levels of chemical contaminants listed in §3.2.2 (Maximum Level of Chemical Contaminants) of the American National Standards for Hemodialysis Systems, March 1992 Edition, published by the AAMI. Copies of the standards are indexed and filed in the [~~Texas~~] Department of Aging and Disability [~~Human~~] Services, 701 W. 51st Street, Austin, Texas 78751-2321, and are available for public inspection during regular working hours.

(2) (No change.)

(3) Water used to prepare dialysate must meet the requirements set forth in §3.2.1 (Hemodialysis Systems) and §3.2.2 (Maximum Level of Chemical Contaminants), March 1992 Edition, published by the AAMI. Copies of the standards are indexed and filed in the [~~Texas~~] Department of Aging and Disability [~~Human~~] Services, 701 W. 51st Street, Austin, Texas 78751-2321, and are available for public inspection during regular working hours.

(4) (No change.)

(u) - (v) (No change.)

(w) Reuse or reprocessing of medical devices. Reuse or reprocessing of disposable medical devices, including but not limited to, dialyzers, end-caps, and blood lines must be in accordance with this subsection.

(1) - (5) (No change.)

(6) An agency practicing reuse of dialyzers must:

(A) - (C) (No change.)

(D) ensure that DADS [~~DHS~~] staff has access to the reprocessing facility as part of an agency inspection.

(x) (No change.)

(y) Home dialysis supplies. Supplies for home dialysis must meet the following requirements.

(1) All drugs, biologicals, and legend medical devices must be obtained for each client pursuant to a physician's prescription in accordance with applicable rules of the Texas State Board of Pharmacy.

(2) (No change.)

(z) Emergency procedures. The agency must adopt and enforce policies and procedures for medical emergencies and emergencies resulting from a disaster [~~addressing fire, natural disaster, and medical emergencies~~].

(1) (No change.)

(2) The agency must ensure that the client and the client's family know the agency's procedures for medical emergencies and emergencies resulting from a disaster.

(3) - (6) (No change.)

(7) In the event of a medical emergency or an emergency resulting from a disaster requiring transport to a hospital for care, the agency must assure the following:

(A) - (C) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER F. ENFORCEMENT

40 TAC §97.602

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The proposed amendment implements Texas Government Code, §531.0055; Texas Human Resources Code, §161.021; and Texas Health and Safety Code, §§142.001 - 142.030.

§97.602. Administrative Penalties.

(a) - (d) (No change.)

(e) Schedule of appropriate and graduated penalties.

(1) Severity Level A violations. DADS may assess a separate Level A administrative penalty for a violation of any of the rules listed in the following table.
Figure: 40 TAC §97.602(e)(1)

(2) Severity Level B violations. DADS may assess a separate Level B administrative penalty for a violation of any of the rules listed in the following table.
Figure: 40 TAC §97.602(e)(2)

(f) - (h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §97.3, concerning license fees; §97.15, concerning issuance of an initial license; §97.17, concerning application procedures for a renewal license; §97.19, concerning issuance of a renewal license; §97.25, concerning application procedures and requirements for change of ownership; and §97.521, concerning requirements for an initial survey, in Chapter 97, Licensing Standards for Home and Community Support Services Agencies.

BACKGROUND AND PURPOSE

The purpose of the amendments is to implement portions of Senate Bill (SB) 1318, 80th Legislature, 2007. SB 1318, in part, amended Texas Health and Safety Code, §142.006, to provide that a license DADS issues to a home and community support services agency (agency) is valid for two years. SB 1318 also amended the Texas Health and Safety Code, §142.006, to allow the HHSC executive commissioner, on behalf of DADS, to adopt a system under which a license expires on various dates during the two-year period, and to prorate the license fee for the year in which a license expiration date is changed. The proposed amendments revise references from a one-year license to a two-year license and establish a staggered system of license renewals and prorated license fees for the first two years in which the rules are in effect. The proposal sets new license fees to accommodate the new two-year licensing period and changes the maximum license fee from $875 to $1,750.

In addition, SB 1318 repealed a provision that allowed an agency to renew a license by paying a renewal fee that is one-and-one-half times the normally required fee if the agency's license has been expired for 90 days or less. The proposed amendments delete the rule that allows an agency to renew an expired license, which was based on the repealed provision.

Finally, the proposal updates the requirements for an initial survey by requiring an agency to submit a written request for an initial survey to the designated survey office no later than six months after the effective date of its initial license.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §97.3 sets new license fees for an initial (including change of ownership) license, renewal license, branch office initial license, branch office renewal license, alternate delivery site initial license, and alternate delivery renewal license to accommodate the new two-year license period. The amendment also establishes a prorated license fee for a one-year renewal license, renewal branch office license, and renewal alternate delivery license issued in accordance with the staggered system of license renewals described in proposed §97.17(b).

The proposed amendment to §97.15 increases the period an initial license is valid from one year to two years.

The proposed amendment to §97.17 increases the licensing period from one year to two years and changes the licensing period for all renewal licenses to two years in increments over a two-year period. For two years after the effective date of the proposed section, DADS will issue a renewal license that is valid for one year to an agency with a license number ending in an odd number. All subsequent license renewals for an agency with a license number ending in an odd number will be valid for two years. DADS will issue a renewal license that is valid for two years to an agency with a license number ending in an even number.

The amendment to §97.17 also removes rule language that allows an agency to renew a license that has been expired for 90 days or less.

The proposed amendment to §97.19 increases the period a renewal license is valid from one year to two years and updates a rule cross-reference.

The proposed amendment to §97.25 increases the period an initial license resulting from a change of ownership is valid from one year to two years and updates a rule cross-reference.

The proposed amendment to §97.521 requires an agency to submit a written request for an initial survey to the designated survey office no later than six months after the effective date of its initial license.

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendments, because the amendments double both license fees and license duration, so the cost an agency pays for licensure per year remains the same. The proposal ensures that the fee for a license issued for less than two years is assessed proportionately.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is that DADS' rules will be in compliance with state law and that DADS will have a standard two-year licensure period across the programs DADS regulates.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sylvia Trevino at (361) 878-3419 in DADS' Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-025, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 025" in the subject line.

SUBCHAPTER A. GENERAL PROVISIONS

40 TAC §97.3

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The amendment affects Texas Government Code, §531.0055 and §531.021, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001-142.030.

§97.3. License Fees.

(a) The schedule of fees for licensure of an agency authorized to provide one or more services is as follows:

(1) initial (includes change of ownership) license fee--$1,750 [~~$875~~];

(2) renewal license fee--$1,750 [~~$875~~];

(3) initial (includes change of ownership) branch office license fee--$1,750 [~~$875~~];

(4) renewal branch office license fee--$1,750 [~~$875~~];

(5) initial (includes change of ownership) alternate delivery site license fee--$1,000 [~~$500~~]; and

(6) renewal alternate delivery site license fee--$600 [~~$300~~].

(b) The license fees for a renewal license, renewal branch office license, and renewal alternate delivery site license are one-half the amounts listed in subsection (a) of this section if renewed for a one-year period in accordance with §97.17(b)(1) of this chapter (relating to Application Procedures for a Renewal License).

(c) [~~(b)~~] If an applicant for an initial license based on a change of ownership makes late application for a license to DADS in accordance with §97.25 of this chapter (relating to Application Procedures and Requirements for Change of Ownership), the applicant must submit the appropriate initial license fee as set out in subsection (a) of this section plus a late fee of $250.

(d) [~~(c)~~] DADS does not consider an application as officially submitted until the applicant pays the license fee. The fee must accompany the application packet.

(e) [~~(d)~~] A fee paid to DADS is not refundable, except as provided by §97.31 of this chapter (relating to Time Frames for Processing and Issuing a License).

(f) [~~(e)~~] DADS accepts a certified check, money order, or personal check made out to the Department of Aging and Disability Services in payment for a required fee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704718
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 438-3734

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SUBCHAPTER B. CRITERIA AND ELIGIBILITY, APPLICATION PROCEDURES, AND ISSUANCE OF A LICENSE

40 TAC §§97.15, 97.17, 97.19, 97.25

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The amendments affect Texas Government Code, §531.0055 and §531.021, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001-142.030.

§97.15. Issuance of an Initial License.

(a) (No change.)

(b) An initial license is valid for two years [~~one year~~] from the date of issuance.

(c) - (e) (No change.)

§97.17. Application Procedures for a Renewal License.

(a) A renewal license is valid for two years, except as provided by subsection (b)(1) [~~one year~~]. In order to continue providing services to clients, an agency must renew its license. of this section

(b) An agency must submit an application for license renewal and a renewal license will be valid as follows:

(1) For two years after the effective date of this section, an agency with a license that ends in an odd number (1, 3, 5, 7, or 9) must submit an application to renew its license before the expiration date on the license in accordance with this section. The agency's first renewal license issued after the effective date of this section is valid for one year, and subsequent renewal licenses are valid for two years.

(2) An agency with a license that ends in an even number (0, 2, 4, 6, or 8) must submit an application to renew its license before the expiration date on the license in accordance with this section. The agency's renewal licenses are valid for two years.

(c) [~~(b)~~] For each license period, an agency must provide services to at least one client.

(d) [~~(c)~~] DADS does not require an agency to admit a client under each category authorized under the license as a condition for renewal of the license.

(e) [~~(d)~~] An agency must document the provision of services and keep documentation readily available for review by a DADS surveyor.

(f) [~~(e)~~] DADS sends notice of expiration of a license to an agency at least 60 days before the expiration date of the license.

(1) If an agency has not received notice of expiration from DADS at least 45 days before the expiration date, the agency must notify DADS and submit a written request for a renewal application for a license.

(2) An agency must submit to DADS a complete and correct renewal application postmarked at least 30 days before the expiration date of a license.

(3) All documents submitted with the renewal application must be notarized copies or originals.

(g) [~~(f)~~] Upon receipt of a renewal application and the renewal license fee, DADS reviews the material to determine whether it is complete and correct. A complete and correct renewal application includes all documents and information that DADS requests as part of the application process. If DADS receives a partial fee, the renewal application and monies are returned.

(1) DADS processes the renewal application according to the time frames in §97.31 of this chapter (relating to Time Frames for Processing and Issuing a License).

(2) If an agency decides not to continue the application process for a renewal license after submitting the renewal application and the renewal license fee, the agency must submit to DADS a written request to withdraw the renewal application. DADS does not refund the renewal license fee.

(3) If an agency receives a notice from DADS that some or all of the information required by this section is missing or incomplete, the agency must submit the required information no later than 30 days after the date of the notice. If an agency fails to submit the required information within 30 days after the notice date, DADS considers the renewal application incomplete and denies the application. If DADS denies the renewal application, DADS does not refund the renewal license fee.

(h) [~~(g)~~] If an agency fails to make a timely and sufficient renewal application at least 30 days before the expiration date of the license, the agency must cease operation on the date the license expires.

[~~(1)~~] If an agency makes a timely renewal application of a license in accordance with this section, and an action to revoke, suspend, or deny renewal of the license is pending, the agency may continue to operate, and the license is valid until the agency has had an opportunity for a formal hearing as described in §97.601 of this chapter (relating to Enforcement Actions). DADS issues a renewal license only if DADS determines the reason for the proposed action no longer exists.

[~~(2) An agency whose license has been expired for 90 days or less may renew the license by paying DADS a renewal fee that is one and one-half times the normally required renewal fee established in §97.3 of this chapter (relating to License Fees). DADS notifies the agency in writing of a pending license expiration.~~]

[~~(3) An agency whose license has been expired for more than 90 days must apply for an initial license in accordance with §97.13 of this chapter (relating to Application Procedures for an Initial License).~~]

(i) [~~(h)~~] If a license holder fails to timely renew a license because the license holder is or was on active duty with the armed forces of the United States of America outside the state of Texas, the license holder may renew the license pursuant to this subsection.

(1) An individual having power of attorney from the license holder or other authority to act on behalf of the license holder may request renewal of the license. The renewal application must include a current address and telephone number for the individual requesting the renewal.

(2) An agency may request a renewal application before or after the expiration of the license.

(3) A copy of the official orders or other official military documentation showing that the license holder is or was on active military duty serving outside the state of Texas must be filed with DADS along with the renewal application.

(4) A copy of the power of attorney from the license holder or other authority to act on behalf of the license holder must be filed with DADS along with the renewal form.

(5) A license holder renewing under this subsection must pay the applicable renewal fee.

(6) A license holder is not authorized to operate the agency for which the license was obtained after the expiration of the license unless and until the license holder actually renews the license.

(7) This subsection applies to a license holder who is an individual or a partnership comprised of individuals, all of whom are or were on active duty with the armed forces of the United States of America serving outside the state of Texas.

§97.19. Issuance of a Renewal License.

(a) A renewal license is valid for two years, except as provided by §97.17(b)(1) of this chapter (related to Application Procedures for a Renewal License) [~~one year~~]. The new licensure period begins the day after the previous license expires.

(b) For renewal of an initial license, an agency must:

(1) - (2) (No change.)

(3) apply for renewal of the license in accordance with §97.17 of this chapter [~~(relating to Application Procedures for a Renewal License)~~].

(c) - (d) (No change.)

§97.25. Application Procedures and Requirements for Change of Ownership.

(a) An application for an initial license resulting from a change of ownership must be requested at least 60 days before the effective date of the change of ownership.

(1) - (3) (No change.)

(4) If an applicant submits a timely and sufficient application packet and license fee and meets all criteria for a license, DADS issues the applicant a license effective on the date of the transfer of ownership. DADS considers an applicant to have filed a timely and sufficient application for a license if the applicant submits:

(A) - (B) (No change.)

(C) a complete and correct application packet and license fee to DADS that is postmarked less than 30 days before the anticipated date of sale or other transfer of ownership, and before the expiration date of the license; and the applicant pays a late fee as required by §97.3(c) [~~§97.3(b)~~] of this chapter (relating to License Fees); or

(D) (No change.)

(5) If an applicant files a timely application packet and license fee, but DADS determines that the application packet is incomplete and a letter explaining the circumstances that prevented its completion was not filed with the application, DADS considers the application timely filed but incomplete.

(A) DADS provides the applicant with written notification of the missing information required to complete the application and may assess a late fee as set out in §97.3(c) [~~§97.3(b)~~] of this chapter for failure to comply with paragraph (1) of this subsection.

(B) (No change.)

(6) The initial license issued to the new owner is valid for two years [~~one year~~] from the date of issuance.

(7) - (8) (No change.)

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704719
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 438-3734

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SUBCHAPTER E. LICENSURE SURVEYS
DIVISION 2. THE SURVEY PROCESS

40 TAC §97.521

STATUTORY AUTHORITY

The amendment is proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of home and community support services agencies.

The amendment affects Texas Government Code, §531.0055 and §531.021, Texas Human Resources Code, §161.021, and Texas Health and Safety Code, §§142.001-142.030.

§97.521. Requirements for an Initial Survey.

(a) - (b) (No change.)

(c) An agency must submit a written request for an initial survey to the designated survey office no later than [~~at least~~] six months after the effective date [~~before the expiration date~~] of its [~~the~~] initial license, unless an agency is exempt as described in subsection (f) of this section. The written request must include:

(1) - (2) (No change.)

(d) - (f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704720
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 438-3734

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CHAPTER 98. ADULT DAY CARE AND DAY ACTIVITY AND HEALTH SERVICES REQUIREMENTS
SUBCHAPTER B. APPLICATION PROCEDURES

40 TAC §§98.11, 98.15, 98.21

The Health and Human Services Commission (HHSC) proposes, on behalf of the Department of Aging and Disability Services (DADS), amendments to §98.11, concerning criteria for licensing; §98.15, concerning renewal procedures and qualifications; and §98.21, concerning license fees; in Chapter 98, Adult Day Care and Day Activity and Health Services Requirements.

BACKGROUND AND PURPOSE

The purpose of the amendments is to comply with some of the provisions of Senate Bill (SB) 1318, 80th Legislature, 2007, which amended the Texas Human Resources Code, §103.006 and §103.007. Texas Human Resources Code, §103.006 increases the license period for adult day care (ADC) facilities from one to two years. Section 103.006 also allows the executive commissioner of HHSC, on behalf of DADS, to adopt by rule a system under which license expiration dates are staggered during a two-year period and to require DADS to prorate fees

for licenses issued for less than two years. Texas Human Resources Code, §103.007 increases the license fee to make it proportionate to the new two-year license period.

SECTION-BY-SECTION SUMMARY

The proposed amendment to §98.11 changes the ADC facility licensing period from one to two years, except for a license issued in accordance with §98.15(b)(1). The amendment to §98.11 also revises a cross-reference.

The proposed amendment to §98.15 removes the requirement that an ADC facility license be renewed annually and sets a new requirement that the license be renewed before the expiration date. Licenses are valid for two years, except a license issued in accordance with the staggered system established in proposed §98.15(b)(1). The staggered system provides, for the first two years the rule is in effect, that a one-year renewal license will be issued to a facility with an identification number that ends in an odd number. All subsequent license renewals to these facilities will be valid for two years. The amendment provides that a two-year renewal license will be issued to a facility with an identification number ending in an even number. The amendment requires that a facility submit a copy of the most current inspection by the local fire marshal during renewal procedures. The amendment also updates a cross-reference and renumbers subsections.

The proposed amendment to §98.21 sets a new two-year license fee for an ADC facility and a prorated fee for a one-year license issued in accordance with the staggered system established in §98.15(b)(1).

FISCAL NOTE

Gordon Taylor, DADS Chief Financial Officer, has determined that, for the first five years the proposed amendments are in effect, enforcing or administering the amendments does not have foreseeable implications relating to costs or revenues of state or local governments.

SMALL BUSINESS AND MICRO-BUSINESS IMPACT ANALYSIS

DADS has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendments, because the proposed amendments double licensing fees and the licensing period concurrently and require that fees for licenses issued for less than two years are prorated.

PUBLIC BENEFIT AND COSTS

Veronda Durden, DADS Assistant Commissioner for Regulatory Services, has determined that, for each year of the first five years the amendments are in effect, the public benefit expected as a result of enforcing the amendments is assurance that DADS operates under rules that comply with statutory law. Additionally, the two-year licensing period will afford consistency across programs regulated by DADS.

Ms. Durden anticipates that there will not be an economic cost to persons who are required to comply with the amendments. The amendments will not affect a local economy.

TAKINGS IMPACT ASSESSMENT

DADS has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

PUBLIC COMMENT

Questions about the content of this proposal may be directed to Calvin Green at (512) 438-4962 in DADS' Regulatory Services Division. Written comments on the proposal may be submitted to Texas Register Liaison, Legal Services-026, Department of Aging and Disability Services W-615, P.O. Box 149030, Austin, Texas 78714-9030, or street address 701 West 51st St., Austin, TX 78751; faxed to (512) 438-5759; or e-mailed to *rulescomments@dads.state.tx.us*. To be considered, comments must be submitted no later than 30 days after the date of this issue of the *Texas Register*. The last day to submit comments falls on a Sunday; therefore, comments must be either (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered to DADS before 5:00 p.m. on DADS' last working day of the comment period; or (3) faxed or e-mailed by midnight on the last day of the comment period. When faxing or e-mailing comments, please indicate "Comments on Proposed Rule 026" in the subject line.

STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Human Resources Code, Chapter 103, which provides the Aging and Disability Services Council with the authority to make recommendations regarding rules governing licensing and regulation of adult day care facilities.

The amendments implement Texas Government Code, §531.0055, and Texas Human Resources Code, §§103.006, 103.007 and 161.021.

§98.11. Criteria for Licensing.

(a) - (b) (No change.)

(c) An applicant for a license must affirmatively show the following:

(1) the applicant, person with a disclosable interest, affiliate, and manager do not have state or federal criminal convictions for any offense that provides a penalty of incarceration;

(2) the facility meets the standards of the Life Safety Code, NFPA 101, 2000 edition;

(3) the facility meets the construction standards in Subchapter C of this chapter (relating to Facility Construction Procedures); and

(4) the facility meets the requirements for operation based on an on-site survey.

(d) DADS may deny an application that remains incomplete after 120 days.

(e) A license will be issued to a facility meeting all requirements of this chapter and will be valid for two years, except as provided by §98.15(b)(1) of this subchapter (relating to Renewal Procedures and Qualifications) [~~one~~ ~~year~~]. The maximum allowable number of clients specified on the license may not be exceeded.

(f) (No change.)

§98.15. Renewal Procedures and Qualifications.

(a) Each license issued under this chapter must be renewed before the license expiration date [~~annually~~]. Each license expires two years [~~12 months~~] from the date issued, except as provided by subsection (b)(1) of this section. A license issued under this chapter is not automatically renewed.

(b) A facility must submit an application for license renewal and a renewal license will be valid as follows:

(1) For two years after the effective date of this section, a facility with a facility identification number that ends in an odd number (1, 3, 5, 7, or 9) must submit an application to renew its license before the expiration date on the license in accordance with this section. The facility's first renewal license issued after the effective date of this section is valid for one year, and subsequent renewal licenses are valid for two years.

(2) A facility with a facility identification number that ends in an even number (0, 2, 4, 6, or 8) must submit an application to renew its license before the expiration date on the license in accordance with this section. The facility's renewal licenses are valid for two years.

(c) [~~(b)~~] Each license holder must file an application for renewal with DADS at least 45 days before the expiration of the current license. DADS considers that an individual has filed a timely and sufficient application for the renewal of a license, if the license holder:

(1) submits a complete application to DADS, and DADS receives that complete application at least 45 days before the current license expires; or

(2) submits an incomplete application to DADS with a letter explaining the circumstances that prevented the inclusion of the missing information, and DADS receives the incomplete application and letter at least 45 days before the current license expires. The missing information must be provided and the application completed within 30 days before the current license expiration date or the application may be denied for failure to provide the required information.

(d) [~~(c)~~] If the application is postmarked by the filing deadline, the application will be considered to be timely filed if received in DADS' Regulatory Services Licensing and Credentialing Section within 15 days after the postmark.

(e) [~~(d)~~] Failure to file a timely and sufficient application will result in the expiration of the license on the expiration date listed on the license.

(f) [~~(e)~~] The application for renewal must contain the same information required for an original application and the license fee as described in §98.21 of this subchapter (relating to License Fees) [~~annual licensing fees~~].

(g) [~~(f)~~] The renewal of a license may be denied for the same reasons an original application for a license may be denied (see §98.19 of this subchapter [~~title~~] (relating to Criteria for Denying a License or Renewal of a License)).

(h) [~~(g)~~] The facility must have an annual inspection by the local fire marshal and must submit a copy of the most current inspection as part of the renewal procedures.

§98.21. License Fees.

The license fee is $50 [~~$25~~]. The license fee for a one-year license issued in accordance with §98.15(b)(1) of this subchapter (relating to Renewal Procedures and Qualifications) is $25. The fee must be paid with each initial application, change of ownership application, and [~~annually~~] with each application for renewal of the license. Payment of fees must be by check or money order made payable to "The Department of Aging and Disability Services".

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704717
Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
Earliest possible date of adoption: November 18, 2007
For further information, please call: (512) 438-3734

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WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 378. SPECIAL NUTRITION PROGRAMS

SUBCHAPTER A. CHILD AND ADULT CARE FOOD PROGRAM (CACFP)

DIVISION 12. ADVANCE PAYMENTS

1 TAC §378.281

The Texas Health and Human Services Commission withdraws the proposed amendments to §378.281 which appeared in the August 10, 2007, issue of the *Texas Register* (32 TexReg 4850).

Filed with the Office of the Secretary of State on October 3, 2007.

TRD-200704657
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: October 3, 2007
For further information, please call: (512) 424-6900

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1 TAC §§378.282 - 378.290

The Texas Health and Human Services Commission withdraws the proposed repeal of §§378.282 - 378.290 which appeared in the August 10, 2007, issue of the *Texas Register* (32 TexReg 4850).

Filed with the Office of the Secretary of State on October 3, 2007.

TRD-200704658
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: October 3, 2007
For further information, please call: (512) 424-6900

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DIVISION 15. OVERPAYMENTS

1 TAC §378.381

The Texas Health and Human Services Commission withdraws the proposed amendments to §378.381 which appeared in the August 10, 2007, issue of the *Texas Register* (32 TexReg 4851).

Filed with the Office of the Secretary of State on October 3, 2007.

TRD-200704659
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: October 3, 2007
For further information, please call: (512) 424-6900

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DIVISION 18. SANCTIONS, PENALTIES, AND FISCAL ACTION

1 TAC §§378.447, 378.451, 378.455

The Texas Health and Human Services Commission withdraws the proposed amendments to §§378.447, 378.451, and 378.455 which appeared in the August 10, 2007, issue of the *Texas Register* (32 TexReg 4851).

Filed with the Office of the Secretary of State on October 3, 2007.

TRD-200704660
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: October 3, 2007
For further information, please call: (512) 424-6900

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TITLE 22. EXAMINING BOARDS

PART 8. TEXAS APPRAISER LICENSING AND CERTIFICATION BOARD

CHAPTER 153. RULES RELATING TO PROVISIONS OF THE TEXAS APPRAISER LICENSING AND CERTIFICATION ACT

22 TAC §153.11, §153.27

Proposed amended §153.11 and §153.27, published in the March 30, 2007, issue of the *Texas Register* (32 TexReg 1825), are withdrawn. The agency failed to adopt the proposal within six months of publication. (See Government Code, §2001.027, and 1 TAC §91.38(d).)

Filed with the Office of the Secretary of State on October 2, 2007.

TRD-200704637

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.102

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.102, concerning the Cost Determination Process - General Principles of Allowable and Unallowable Costs, in its Reimbursement Rates Chapter, without changes to the proposed text as published in the August 10, 2007, issue of the *Texas Register* (32 TexReg 4829) and will not be republished.

Background and Justification

This rule establishes general principles of allowable and unallowable costs. HHSC, under its authority and responsibility to administer and implement rates, is updating these principles by requiring experienced cost report preparers to complete state-sponsored online cost report training in place of state-sponsored classroom-based training. Cost report preparers who have never attended classroom-based cost report training will continue to be required to attend classroom-based training. All other preparers will be required to complete state-sponsored online cost report training. These preparers will not have the option of receiving training completion certificates through classroom-based training.

Comments

The 30-day comment period ended September 9, 2007. During this period, HHSC received two comments regarding the proposed amendment to this rule from the Texas Association for Home Care (TAHC). A summary of the comments and HHSC's responses follows:

Comment: HHSC should consider allowing experienced cost report preparers the option of attending classroom-based cost report training.

Response: The classroom-based trainings will be designed for first-time preparers and will not be appropriate for experienced preparers. HHSC did not change the proposed rule in response to this comment.

Comment: Since Certified Public Accountants (CPAs) currently receive continuing professional education (CPE) hours for attending classroom-based training; will provisions be made for CPAs to receive CPE hours for participating in the online training?

Response: The purpose of cost report training is to train preparers in the proper preparation of cost reports, not to provide CPE hours. While HHSC is happy to be able to provide CPE hours as an added benefit of attending the classroom-based training and will attempt to secure CPE hours for online training as well, it is not HHSC's responsibility to provide CPE hours for CPAs. It is not necessary to add language to the rule concerning CPE hours for CPAs, and no change to the rule was made in response to this comment.

The amendment is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021, and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704786
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: October 28, 2007
Proposal publication date: August 10, 2007
For further information, please call: (512) 424-6900

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CHAPTER 355. REIMBURSEMENT RATES

The Health and Human Services Commission (HHSC) adopts amendments to §355.112, concerning the Attendant Compensation Rate Enhancement Program, and §355.503, concerning the Reimbursement Methodology for the Community-Based Alternatives Waiver Program, in its Reimbursement Rates Chapter. Section 355.112 is adopted with changes to the proposed text as published in the August 10, 2007, issue of the *Texas Register* (32 TexReg 4836). The text of the rule will be republished. Section 355.503 is adopted without changes to the proposed text as published in the August 10, 2007, issue of the *Texas Register* (32 TexReg 4836) and will not be republished.

The amended §355.112 establishes the Attendant Compensation Rate Enhancement. HHSC, under its authority and

responsibility to administer and implement rates, is updating these rules to add Integrated Care Management-Home and Community Support Services (ICM-HCSS) and ICM-Assisted Living/Residential Care (ICM-AL/RC) to the list of programs eligible to participate in the Attendant Compensation Rate Enhancement and to specify that any references in the rule to Community Based Alternatives (CBA) program services also apply to the parallel service offered under ICM.

The amended §355.503 establishes the reimbursement methodology for the Community-Based Alternatives waiver program. HHSC, under its authority and responsibility to administer and implement rates, is updating these rules to incorporate ICM-HCSS and ICM-AL/RC into the CBA reimbursement methodology and to clarify that, for reimbursement determination purposes, ICM-HCSS and ICM-AL/RC providers are subject to the same cost reporting requirements and are incorporated into the same reimbursement determination methodology as CBA-HCSS and CBA-AL/RC providers.

Comments

The 30-day comment period ended September 9, 2007. During this period, HHSC received two comments regarding the proposed amendments to these rules. The Texas Association for Home Care (TAHC) issued comments on the amendment to §355.503 and the Department of Aging and Disability Services (DADS) issued a comment on the amendment to §355.112. A summary of the comments and HHSC's responses follows:

Comment: HHSC should revise §355.503 to include the option for ICM-HCSS providers to perform the pre-assessment in ICM because TAHC has been in discussions with DADS and the single ICM Contractor regarding the option for the ICM-HCSS providers to perform the pre-enrollment assessment as it currently is performed in the CBA program.

Response: HHSC did not make any changes to the proposed rule as a result of this comment. This rule revision addresses DADS' reimbursements to the ICM providers. DADS will not reimburse ICM-HCSS providers for the pre-enrollment assessment because the assessment is the responsibility of the single ICM Contractor. If the single ICM Contractor chooses to have the ICM-HCSS provider complete the pre-enrollment assessment, reimbursement for the assessment is the responsibility of the single ICM Contractor.

Comment: The language at §355.112(f) should be modified to make it clear that it is the provider who designates person(s) authorized to sign contracts on behalf of their legal entity and not DADS.

Response: HHSC is revising this subsection to clarify the provider designates a signature authority using a DADS form. HHSC is also revising §355.112(g) to make the same clarification.

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.112

The amendments are adopted under the Human Resources Code, §32.021, which provides HHSC with the authority to adopt rules necessary to administer the federal medical assistance (Medicaid) program in Texas; Texas Government Code, §531.033, which authorizes the executive commissioner of HHSC to adopt rules necessary to carry out the commission's duties under Chapter 531; and Government Code §531.0055, which authorizes the Executive Commissioner to adopt rules for the operation and provision of health and human services by the health and human services agencies and to adopt or approve rates of payment required by law to be adopted or approved by a health and human services agency.

§355.112. Attendant Compensation Rate Enhancement.

(a) Eligible programs. Providers contracted in the Primary Home Care (PHC); Day Activity and Health Services (DAHS); Residential Care (RC); Community Living Assistance and Support Services (CLASS)--Direct Service Agency; Community Based Alternatives (CBA)--Home and Community Support Services (HCSS); Integrated Care Management (ICM)-HCSS; Deaf-Blind Multiple Disabilities Waiver (DBMD); CBA--Assisted Living/Residential Care (AL/RC) programs; and ICM AL/RC are eligible to participate in the attendant compensation rate enhancement. References in this section to CBA program services also apply to the parallel services offered under the ICM program.

(b) Definition of attendant. An attendant is the unlicensed caregiver providing direct assistance to the clients with Activities of Daily Living (ADL) and Instrumental Activities of Daily Living (IADL).

(1) In the case of DAHS, RC, and CBA AL/RC programs, the attendant may perform some nonattendant functions. In such cases, the attendant must perform attendant functions at least 80% of his or her total time worked. Staff in these settings not providing attendant services at least 80% of their total time worked are not considered attendants. Time studies must be performed in accordance with §355.105(b)(2)(B)(i) for staff in the DAHS, RC, and CBA AL/RC programs that are not full-time attendants but perform attendant functions to determine if a staff member meets this 80% requirement. Failure to perform the time studies for these staff will result in the staff not being considered to be attendants.

(2) Attendants do not include the director, administrator, assistant director, assistant administrator, clerical and secretarial staff, professional staff, other administrative staff, licensed staff, attendant supervisors, cooks and kitchen staff, maintenance and groundskeeping staff, activity director, and laundry and housekeeping staff. In the case of PHC, CLASS, CBA HCSS, and DBMD staff other than attendants may deliver attendant services and be considered an attendant if they must perform attendant services that cannot be delivered by another attendant to prevent a break in service.

(3) An attendant also includes a driver in the DAHS, RC, and CBA AL/RC programs.

(4) An attendant also includes medication aides in the RC and CBA AL/RC programs.

(c) Attendant compensation cost center. This cost center will include employee compensation, contract labor costs, and personal vehicle mileage reimbursement for attendants as defined in subsection (b) of this section.

(1) Attendant compensation is the allowable compensation for attendants defined in §355.103(b)(1) of this title (relating to Specifications for Allowable and Unallowable Costs) and required to be reported as either salaries and/or wages, including payroll taxes and workers' compensation, or employee benefits. Benefits required by §355.103(b)(1)(A)(iii) of this title (relating to Specifications for Allowable and Unallowable Costs) to be reported as costs applicable to specific cost report line items, except as noted in paragraph (3) of this subsection, are not to be included in this cost center.

(2) Contract labor refers to personnel for whom the contracted provider is not responsible for the payment of payroll taxes, such as FICA, Medicare, and federal and state unemployment insurance, and who perform tasks routinely performed by employees where allowed by program rules. Allowable contract labor costs are defined in §355.103(b)(2)(C) of this title (relating to Specifications for Allowable and Unallowable Costs).

(3) Mileage reimbursement paid to the attendant for the use of his or her personal vehicle and which is not subject to payroll taxes is considered compensation for this cost center.

(d) Rate year. The rate year begins on the first day of September and ends on the last day of August of the following year.

(e) Open enrollment. Open enrollment begins on the first day of July and ends on the last day of that same July preceding the rate year for which payments are being determined, unless the Texas Health and Human Services Commission (HHSC) notified providers before the first day of July that open enrollment has been postponed or cancelled. Should conditions warrant, HHSC may conduct additional enrollment periods during a rate year.

(f) Enrollment contract amendment. An initial enrollment contract amendment is required from each provider choosing to participate in the attendant compensation rate enhancement. On the initial enrollment contract amendment, the provider must specify for each contract a desire to participate or not to participate. The participating provider must specify for each program the desire to have all participating contracts be considered as a group or as individuals for purposes related to the attendant compensation rate enhancement. For the PHC program, the participating provider must also specify if he wishes to have priority, nonpriority, or both priority and nonpriority services participating in the attendant compensation rate enhancement. If the PHC provider selects to have their contracts participating as a group, then the provider must select to have priority, nonpriority, or both priority and nonpriority services participate for the entire group of contracts. For providers delivering services to both RC and CBA AL/RC clients in the same facility, participation includes both the RC and CBA AL/RC programs. After initial enrollment, participating and nonparticipating providers may request to modify their enrollment status during any open enrollment period. A nonparticipant can request to become a participant; a participant can request to become a nonparticipant; a participant can request to change its participation level; a provider whose participating contracts are being considered as a group can request to have them considered as individuals; and a provider whose participating contracts are being considered as individuals can request to have them considered as a group. Providers whose prior year enrollment was limited by subsection (u) of this section who request to increase their enrollment levels will be limited to increases of three or fewer enhancement levels during any single open enrollment period. Requests to modify a provider's enrollment status during an open enrollment period must be received by HHSC Rate Analysis by the last day of the open enrollment period as per subsection (e) of this section. If the last day of open enrollment is on a weekend day, state holiday, or national holiday, the next business day will be considered the last day requests will be accepted. Providers from which HHSC Rate Analysis has not received an acceptable request to modify their enrollment by the last day of the open enrollment period will continue at the level of participation and group or individual status in effect during the open enrollment period within available funds until the provider notifies HHSC in accordance with subsection (x) of this section that it no longer wishes to participate or until the provider's enrollment is limited in accordance with subsection (u) of this section. To be acceptable, an enrollment contract amendment must be completed according to instructions, signed by an authorized signatory as per the Texas Department of Aging and Disability Services' (DADS') signature authority designation form applicable to the provider's contract or ownership type, and legible.

(g) New contracts. For the purposes of this section, for each rate year a new contract is defined as a contract delivering its first day of service to a DADS client on or after the first day of the open enrollment period, as defined in subsection (e) of this section, for that rate year. Contracts that underwent a contract assignment are not considered new contracts. For purposes of this subsection, an acceptable contract amendment is defined as a legible enrollment contract amendment that has been completed according to instructions, signed by an authorized signator as per the DADS' signature authority designation form applicable to the provider's contract or ownership type, and received by HHSC Rate Analysis within 30 days of the mailing of notification to the provider that such an enrollment contract amendment must be submitted. If the 30th day is on a weekend day, state holiday, or national holiday, the next business day will be considered the last day requests will be accepted. New contracts will receive the nonparticipant attendant compensation rate as specified in subsection (l) of this section with no enhancements. For new contractors specifying their desire to participate in the attendant compensation rate enhancement on an acceptable enrollment contract amendment, the attendant compensation rate is adjusted as specified in subsection (r) of this section, effective on the first day of the month following receipt by HHSC of an acceptable enrollment contract amendment. If the granting of newly requested enhancements was limited by subsection (p)(2)(B) of this section during the most recent enrollment, enrollment for new contracts will be subject to that same limitation. If the most recent enrollment was cancelled by subsection (e) of this section, new contracts will not be permitted to be enrolled.

(h) Attendant Compensation Report submittal requirements. Attendant Compensation Reports must be submitted as follows.

(1) Annual Attendant Compensation Report. All participating contracted providers will provide HHSC Rate Analysis, in a method specified by HHSC Rate Analysis, an annual Attendant Compensation Report reflecting the activities of the provider while delivering contracted services from the first day of the rate year through the last day of the rate year. This report must be submitted for each participating contract if the provider requested participation individually for each contract; or, if the provider requested participation as a group, the report must be submitted as a single aggregate report covering all contracts participating at the end of the rate year within one program of the provider. A participating contract that has been terminated in accordance with subsection (v) of this section or that has undergone a contract assignment in accordance with subsection (w) of this section will be considered to have participated on an individual basis for compliance with reporting requirements for the owner prior to the termination or contract assignment. This report will be used as the basis for determining compliance with the spending requirements and recoupment amounts as described in subsection (s) of this section. Contracted providers failing to submit an acceptable annual Attendant Compensation Report within 60 days of the end of the rate year will be placed on vendor hold until such time as an acceptable report is received and processed by HHSC Rate Analysis.

(A) When a participating provider changes ownership through a contract assignment, the prior owner must submit an Attendant Compensation Report covering the period from the beginning of the rate year to the effective date of the contract assignment as determined by HHSC or its designee. This report will be used as the basis for determining any recoupment amounts as described in subsection (s) of this section. The new owner will be required to submit an Attendant Compensation Report covering the period from the day after the date

recognized by HHSC or its designee as the contract-assignment effective date to the end of the rate year.

(B) Participating providers whose contracts are terminated voluntarily or involuntarily must submit an Attendant Compensation Report covering the period from the beginning of the rate year to the date recognized by HHSC or its designee as the contract termination date. This report will be used as the basis for determining recoupment as described in subsection (s) of this section.

(C) Participating providers who voluntarily withdraw from participation, as described in subsection (x) of this section, must submit an Attendant Compensation Report within 60 days from the date of withdrawal as determined by HHSC. This report must cover the period from the beginning of the rate year through the date of withdrawal as determined by HHSC and will be used as the basis for determining any recoupment amounts as described in subsection (s) of this section.

(D) Participating providers whose cost report year, as defined in §355.105(b)(5) of this title (relating to General Reporting and Documentation Requirements, Methods and Procedures), coincides with the state of Texas fiscal year, are exempt from the requirement to submit a separate annual Attendant Compensation Report. For these contracts, their cost report will be considered their annual Attendant Compensation Report.

(2) Other reports. HHSC may require other reports from all contracts as needed.

(3) Vendor hold. HHSC or its designee will place on hold the vendor payments for any participating contractor who does not submit an Attendant Compensation Report completed in accordance with all applicable rules and instructions by the due dates described in this subsection. This vendor hold will remain in effect until HHSC Rate Analysis receives an acceptable Attendant Compensation Report. Participating contracts that do not submit an Attendant Compensation Report completed in accordance with all applicable rules and instructions within 60 days of the due dates described in this subsection will become nonparticipants retroactive to the first day of the reporting period in question and will be subject to an immediate recoupment of funds related to participation paid to the facility for services provided during the reporting period in question. These contracts will remain nonparticipants and recouped funds will not be restored until they submit an acceptable report and repay to HHSC or its designee funds identified for recoupment from subsection (s) of this section. If an acceptable report is not received within 365 days of the due date, the recoupment will become permanent and, if all funds associated with participation during the reporting period in question have been recouped by HHSC or its designee, the vendor hold associated with the report will be released. In addition, participating contracts that have terminated or undergone a contract assignment from one legal entity to a different legal entity that do not submit an Attendant Compensation Report within 60 days of the contract assignment or contract termination effective date will become nonparticipants retroactive to the first day of the reporting period in question. These contracts will remain nonparticipants and recouped funds will not be restored until they submit an acceptable report and repay to HHSC or its designee funds identified for recoupment under subsection (s) of this section. If an acceptable report is not received within 365 days of the contract assignment or contract termination effective date, the recoupment will become permanent and, if all funds associated with participation during the reporting period in question have been recouped by HHSC or its designee, the vendor hold associated with the report will be released.

(4) Provider-initiated amended Attendant Compensation Reports. Provider-initiated amended Attendant Compensation Reports must be received prior to the date the provider is notified of compliance with spending requirements for the report in question in accordance with subsection (s) of this section.

(i) Attendant Compensation Report contents. Each Attendant Compensation Report will include any information required by HHSC to implement this attendant compensation rate enhancement.

(j) Completion of compensation reports. All Attendant Compensation Reports must be completed in accordance with the provisions of §§355.102 - 355.105 of this title (relating to General Principles of Allowable and Unallowable Costs, Specifications for Allowable and Unallowable Costs, Revenues, and General Reporting and Documentation Requirements, Methods, and Procedures) and may be reviewed or audited in accordance with §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports). Beginning with the rate year that starts September 1, 2002, all Attendant Compensation Reports must be completed by preparers who have attended the required cost report training for the applicable program under §355.102(d) of this title (relating to General Principles of Allowable and Unallowable Costs). For Attendant Compensation Reports for even numbered state fiscal years, preparers must have attended the cost report training for that same even numbered year. For Attendant Compensation Reports for odd numbered state fiscal years, preparers must have attended the most recent cost report training sessions provided prior to the due date of the Attendant Compensation Report.

(k) Enrollment. Providers choosing to participate in the attendant compensation rate enhancement must submit to HHSC a signed enrollment contract amendment as described in subsection (f) of this section. Participation is determined separately for each program specified in subsection (a) of this section, except that for providers delivering services to both RC and CBA AL/RC clients in the same facility, participation includes both the RC and CBA AL/RC programs. For PHC, participation is also determined separately for priority and nonpriority services. Participation will remain in effect, subject to availability of funds, until the provider notifies HHSC, in accordance with subsection (x) of this section, that it no longer wishes to participate or until HHSC excludes the contract from participation for reasons outlined in subsection (u) of this section. Contracts voluntarily withdrawing from participation will have their participation end effective with the date of withdrawal as determined by HHSC. Contracts excluded from participation will have their participation end effective on the date determined by HHSC.

(l) Determination of attendant compensation rate component for nonparticipating contracts. For each of the programs identified in subsection (a) of this section, HHSC will calculate an attendant compensation rate component for nonparticipating contracts as follows.

(1) Determine for each contract included in the cost report data base used in determination of rates in effect on September 1, 1999, the attendant compensation cost center from subsection (c) of this section.

(2) Adjust the cost center data from paragraph (1) of this subsection in order to account for inflation utilizing the inflation factors used in the determination of the September 1, 1999 rates.

(3) For each contract included in the cost report database used to determine rates in effect on September 1, 1999, divide the result from paragraph (2) of this subsection by the corresponding units of service. Provider projected costs per unit of service are rank-ordered from low to high, along with the provider's corresponding units of service. For DAHS, the median cost per unit of service is selected. For all other programs, the units of service are summed until the median unit of service is reached. The corresponding projected cost per unit of service is the weighted median cost component. The result is multiplied by 1.044 for all programs in subsection (a) of this section except

for RC and CBA AL/RC, which is multiplied by 1.07. The result is the attendant compensation rate component for nonparticipating contracts.

(4) The attendant compensation rate component for nonparticipating contracts will remain constant over time, except for adjustments necessitated by increases in the minimum wage. In such cases, adjustments to the nonparticipating rates are limited to ensuring that these rates are adequate to cover mandated minimum wage levels.

(m) Determination of attendant compensation base rate for participating contracts.

(1) For each of the programs identified in subsection (a) of this section except for CBA AL/RC, the attendant compensation base rate is equal to the attendant compensation rate component for nonparticipating contracts from subsection (l) of this section.

(2) For CBA AL/RC, the attendant compensation base rate will be determined by taking into consideration quality of care, labor market conditions, economic factors, and budget constraints.

(n) Determination of attendant compensation rate enhancements. HHSC will determine a per diem add-on payment for each enhanced attendant compensation level using data from sources such as cost reports, surveys, and/or other relevant sources and taking into consideration quality of care, labor market conditions, economic factors, and budget constraints. The attendant compensation rate enhancement add-ons will be determined on a per-unit-of-service basis applicable to each program or service. Add-on payments may vary by enhancement level.

(o) Enhanced attendant compensation. Contracts desiring to participate in the enhanced attendant compensation rate may request attendant compensation levels from an array of enhanced attendant compensation options and associated add-on payments determined in subsection (n) of this section during open enrollment. Participating providers who select to have all of their contracts participate in a program as a group must request a single attendant compensation level for the entire group of contracts. PHC providers participating as a group must select a single attendant compensation level for their entire group of contracts for the priority and/or nonpriority services they have selected for participation.

(p) Granting attendant compensation rate enhancements. HHSC divides all requested enhancements, after applying any enrollment limitations from subsection (u) of this section, into two groups: pre-existing enhancements, which providers request to carry over from the prior year, and newly-requested enhancements. Newly-requested enhancements may be enhancements requested by providers who were nonparticipants in the prior year or by providers who were participants in the prior year who seek additional enhancements. Using the process described herein, HHSC first determines the distribution of carry-over enhancements. If funds are available after the distribution of carry-over enhancements, HHSC determines the distribution of newly-requested enhancements. HHSC may not distribute newly-requested enhancements to providers owing funds identified for recoupment under subsection (s) of this section.

(1) For all programs and levels except for CBA AL/RC Level 1, HHSC determines projected units of service for contracts requesting each enhancement level and multiplies this number by the enhancement rate add-on amount associated with that enhancement level as determined in subsection (n) of this section. For CBA AL/RC Level 1, HHSC determines projected units of service for CBA AL/RC contracts requesting Level 1 and multiplies this number by the sum of the difference between the base rate and the nonparticipant rate and the enhancement add-on amount associated with enhancement Level 1 as follows: (Base Rate - Nonparticipant Rate) + Level 1 add-on amount.

(2) HHSC compares the sum of the products from paragraph (1) of this subsection to available funds.

(A) If the sum of the products is less than or equal to available funds, all requested enhancements are granted.

(B) If the sum of the products is greater than available funds, enhancements are granted beginning with the lowest level of enhancement and granting each successive level of enhancement until requested enhancements are granted within available funds. Based upon an examination of existing compensation levels and compensation needs, HHSC may grant certain enhancement options priority for distribution.

(q) Notification of granting of enhancements. Participating contracts are notified, in a manner determined by HHSC, as to the disposition of their request for attendant compensation rate enhancements.

(r) Total attendant compensation rate for participating providers. Each participating provider's total attendant compensation rate will be equal to the attendant compensation base rate from subsection (m) of this section plus any add-on payments associated with enhanced attendant compensation levels selected by and awarded to the provider during open enrollment.

(s) Spending requirements for participating contracts. HHSC will determine from the Attendant Compensation Report, as specified in subsection (h) of this section and other appropriate data sources, the amount of attendant compensation spending per unit of service delivered. The provider's compliance with the spending requirement is determined based on the total attendant compensation spending as reported on the Attendant Compensation Report for each participating contract if the provider requested participation individually for each contract. A participating contract that has been terminated in accordance with subsection (v) of this section or that has undergone a contract assignment in accordance with subsection (w) of this section will be considered to have participated on an individual basis for compliance with the spending requirement for the owner prior to the termination or contract assignment. In all other cases, if the provider specified that he wished to have all participating contracts be considered as a group for purposes related to the attendant compensation rate enhancement (as specified in subsection (f) of this section) compliance with the spending requirement is based on the total attendant compensation as reported on the single aggregate Attendant Compensation Report described in subsection (h) of this section. Compliance with the spending requirement is determined separately for each program specified in subsection (a) of this section, except for providers delivering services to both RC and CBA AL/RC clients in the same facility whose compliance is determined by combining both programs. HHSC will calculate recoupment, if any, as follows.

(1) For the rate years beginning September 1, 2003 and September 1, 2004, the attendant compensation spending per unit of service is multiplied by 1.10 to determine the adjusted attendant compensation per unit of service. The adjusted attendant compensation per unit of service will be subtracted from the accrued attendant compensation revenue to determine the amount to be recouped. If the adjusted attendant compensation per unit of service is greater than or equal to the accrued attendant compensation revenue per unit of service, there is no recoupment.

(2) For the rate year beginning September 1, 2005, and thereafter, the accrued attendant compensation revenue per unit of service is multiplied by 0.90 to determine the spending requirement per unit of service. The unadjusted accrued attendant compensation spending per unit of service will be subtracted from the spending requirement per unit of service to determine the amount to be recouped. If the unadjusted accrued attendant compensation spending per unit of service

is greater than or equal to the spending requirement per unit of service, there is no recoupment.

(3) The amount paid for attendant compensation per unit of service after adjustments for recoupment must not be less than the amount determined for nonparticipating contracts in subsection (l) of this section.

(t) Notification of recoupment. Providers will be notified in a manner specified by HHSC of the amount to be repaid to HHSC or its designee. If a subsequent review by HHSC or audit results in adjustments to the annual Attendant Compensation Report, as described in subsection (h)(1) of this section, that change the amount to be repaid, the provider will be notified in writing of the adjustments and the adjusted amount to be repaid. HHSC or its designee will recoup any amount owed from a provider's vendor payment(s) following the date of the notification letter.

(u) Enrollment limitations. A provider will not be enrolled in the attendant compensation rate enhancement at a level higher than the level it achieved on its most recently available, audited Attendant Compensation Report. HHSC will issue a notification letter that informs a provider in writing of its enrollment limitations (if any) prior to the first day of the open enrollment period.

(1) Requests for revision. A provider may request a revision of its enrollment limitation if the provider's most recently available audited Attendant Compensation Report does not represent its current attendant compensation levels.

(A) A request for revision of enrollment limitation must include the documentation specified in subparagraph (B) of this paragraph and must be received by HHSC Rate Analysis by hand delivery, United States mail, or special delivery mail no later than 30 calendar days from the date on the notification letter. If the 30th calendar day is a weekend day, national holiday, or state holiday, the first business day following the 30th calendar day is the final day the receipt of the written request will be accepted. A request for revision that is not received by the stated deadline and that is not submitted on the form specified by HHSC will not be accepted, and the enrollment limitation specified in the notification letter will apply.

(B) A provider that requests a revision of its enrollment limitation must submit documentation, in the form specified by HHSC in the notification letter, which shows that, for the period beginning September 1 of the current rate year and ending April 30 of the current rate year, the provider met a higher attendant compensation level than the notification letter indicates. In such cases, the provider's enrollment limitation will be established at the level supported by its request for revision documentation. It is the responsibility of the provider to render all required documentation at the time of its request for revision. Requests not in the form specified by HHSC in the notification letter and requests that fail to support an attendant compensation level different from what is indicated in the notification letter will result in a rejection of the request, and the enrollment limitation specified in the notification letter will apply.

(C) A request for revision must be signed by an individual legally responsible for the conduct of the provider or legally authorized to bind the provider, such as the sole proprietor, a partner, a corporate officer, an association officer, a governmental official, a limited liability company member, a person authorized by the applicable DADS Form 2031 for the interested party on file at the time of the request, or a legal representative for the interested party. A request for revision that is not signed by an individual legally responsible for the conduct of the interested party will not be accepted, and the enrollment limitation specified in the notification letter will apply.

(D) If the provider's Attendant Compensation Report for the rate year that included the open enrollment period described in subsection (e) of this section shows the provider compensated attendants below the level it presented in its request for revision, HHSC will immediately recoup all enhancement payments associated with the request for revision documents, and the provider will be limited to the level supported by the report for the remainder of the rate year.

(2) Informal reviews and formal appeals. The filing of a request for an informal review or formal appeal relating to a provider's most recently available, audited Attendant Compensation Report under §355.110 of this title (relating to Informal Reviews and Formal Appeals) does not stay or delay implementation of an enrollment limitation applied in accordance with the requirements of this subsection. If an informal review or formal appeal relating to a provider's most recently available, audited Attendant Compensation Report is pending at the time the enrollment limitation is applied, the result of the informal review or formal appeal shall be applied to the provider's enrollment retroactively to the beginning of the rate year to which the enrollment limitation was originally applied.

(3) New owners after a contract assignment that is an ownership change from one legal entity to a different legal entity. Enhancement levels for a new owner after a contract assignment that is an ownership change from one legal entity to a different legal entity will be determined in accordance with subsection (w) of this section. A new owner after a contract assignment that is an ownership change from one legal entity to a different legal entity will not be subject to enrollment limitations based upon the prior owner's performance.

(4) New providers. A new provider's enrollment will be determined in accordance with subsection (g) of this section.

(v) Contract terminations. For contracted providers required to submit an Attendant Compensation Report due to a contract termination as described in subsection (h)(1)(B) of this section, HHSC or its designee will place a vendor hold on the payments of the contracted provider until HHSC receives an acceptable Attendant Compensation Report, as specified in subsection (h)(2)(A) of this section, and funds identified for recoupment from subsection (s) of this section are repaid to HHSC or its designee. Informal reviews and formal appeals relating to these reports are governed by §355.110 of this title (relating to Informal Reviews and Formal Appeals). HHSC or its designee will recoup any amount owed from the provider's vendor payments that are being held. In cases where funds identified for recoupment cannot be repaid from the held vendor payments, the responsible entity from subsection (cc) of this section will be jointly and severally liable for any additional payment due to HHSC or its designee. Failure to repay the amount due or submit an acceptable payment plan within 60 days of notification will result in the recoupment of the owed funds from other HHSC and/or DADS contracts controlled by the responsible entity, placement of a vendor hold on all HHSC and/or DADS contracts controlled by the responsible entity, and will bar the responsible entity from enacting new contracts with HHSC and/or DADS until repayment is made in full. The responsible entity for these contracts will be notified as described in subsection (t) of this section prior to the recoupment of owed funds, placement of vendor hold on additional contracts, and barring of new contracts.

(w) Contract assignments. The following applies to contract assignments.

(1) Definitions. The following words and terms have the following meanings when used in this subsection.

(A) Assignee--A legal entity that assumes a Community Care contract through a legal assignment of the contract from the

contracting entity as provided in 40 TAC §49.15 (relating to Contract Assignment).

(B) Assignor--A legal entity that assigns its Community Care contract to another legal entity as provided in 40 TAC §49.15 (relating to Contract Assignment).

(C) Contract assignment--The transfer of a contract by one legal entity to another legal entity as provided in 40 TAC §49.15 (relating to Contract Assignment).

(i) Type One Contract Assignment--A contract assignment by which the assignee is an existing Community Care contract.

(ii) Type Two Contract Assignment--A contract assignment by which the assignee is a new Community Care contract.

(2) Participation and group status after a contract assignment. Participation and group status after a contract assignment are determined as follows:

(A) Type One Contract Assignments. For Type One contract assignments, the assignee's level of participation and group status remains the same while the assignor's level of participation and grouping status changes to the assignee's.

(B) Type Two Contract Assignments. For Type Two contract assignments the following applies:

(i) In cases where the assignee is controlled by a legal entity that controls other contracts participating in the attendant compensation rate enhancement, the following applies:

(I) If the assignee's participating contracts are participating as a group as subsection (f) of this section.

(-a-) If the assignor was a participating contract, the new contract becomes part of the assignee's group at the level of participation of the assignee's group.

(-b-) If the assignor was not a participating contract, the new contract remains a nonparticipating contract.

(II) If the assignee's participating contracts are participating as individuals as provided subsection (f) of this section, the following applies:

(-a-) If the assignor was a participating contract, the new contract continues participation at the assignor's level as an individual contract whether or not the assignor contract was part of a group.

(-b-) If the assignor was not a participating contract, the new contract remains a nonparticipating contract.

(ii) In cases where the assignee is controlled by a legal entity that does not control any contracts participating in the attendant compensation rate enhancement, the level of participation and individual or group status of the assignor contract(s) will continue unchanged under the assignee contract(s).

(3) The assignee is responsible for the reporting requirements in subsection (h) of this section for any reporting period days occurring after the contract assignment effective date. If the contract assignment occurs during an open enrollment period as defined in subsection (e) of this section, the owner recognized by HHSC or its designee on the last day of the enrollment period may request to modify the enrollment status of the contract in accordance with subsection (f) of this section.

(4) For contracted providers required to submit an Attendant Compensation Report due to contract assignment, as described in subsection (h)(1)(A) of this section, HHSC or its designee will place a vendor hold on the payments of the existing contracted provider until HHSC receives an acceptable Attendant Compensation Report, as specified in subsection (h)(2)(B) of this section, and until funds identified for recoupment from subsection (s) of this section are repaid to HHSC or its designee. HHSC or its designee will recoup any amount owed from the provider's vendor payments that are being held. In cases where funds identified for recoupment cannot be repaid from the held vendor payments, the responsible entity from subsection (cc) of this section will be jointly and severally liable for any additional payment due to HHSC or its designee. Failure to repay the amount due within 60 days of notification will result in the recoupment of the owed funds from other HHSC and/or DADS contracts controlled by the responsible entity, placement of a vendor hold on all HHSC and/or DADS contracts controlled by the responsible entity, and will bar the responsible entity from enacting new contracts with HHSC and/or DADS until repayment is made in full. The responsible entity for these contracts will be notified, as described in subsection (t) of this section, prior to the recoupment of owed funds, placement of vendor hold on additional contracts, and barring of new contract.

(x) Voluntary withdrawal. Participating contracts wishing to withdraw from the attendant compensation rate enhancement must notify HHSC Rate Analysis in writing by certified mail. The requests will be effective the first of the month following the receipt of the request. Contracts voluntarily withdrawing must remain nonparticipants for the remainder of the rate year. Providers whose contracts are participating as a group must request withdrawal of all the contracts in the group.

(y) Adjusting attendant compensation requirements. Providers that determine that they will not be able to meet their attendant compensation requirements may request to reduce their attendant compensation requirements and associated enhancement payment to a lower participation level by submitting a written request to HHSC Rate Analysis by certified mail. These requests will be effective the first of the month following the receipt of the request. Providers whose contracts are participating as a group must request the same reduction for all of the contracts in the group.

(z) All other rate components. All other rate components will continue to be calculated as specified in the program-specific reimbursement methodology and will be uniform for all providers.

(aa) Failure to document spending. Undocumented attendant compensation expenses will be disallowed and will not be used in the determination of the attendant compensation spending per unit of service in subsection (s) of this section.

(bb) Appeals. Subject matter of informal reviews and formal appeals is limited as per §355.110 of this title (relating to Informal Reviews and Formal Appeals).

(cc) Responsible entities. The contracted provider, owner, or legal entity which received the attendant compensation rate enhancement is responsible for the repayment of the recoupment amount.

(dd) Reinvestment. HHSC will reinvest recouped funds in the attendant compensation rate enhancement to the extent there are qualifying contracts.

(1) Identify qualifying contracts. Contracts that meet the following criteria during the most recently completed reporting period are qualifying contracts for reinvestment purposes.

(A) The contract was a participant in the attendant compensation rate enhancement.

(B) The contract's attendant compensation spending per unit of service was greater than the total attendant compensation rate per unit of service granted to the contract.

(C) An acceptable Attendant Compensation Report for the reporting period completed in accordance with all applicable rules and instructions was received by HHSC Rate Analysis at least 30 days prior to the date on which HHSC determined how available reinvestment funds would be distributed.

(D) The DADS contract that was in effect during the reinvestment reporting period is still in effect as an active contract when reinvestment is determined and there has been no ownership change from one legal entity to a different legal entity.

(2) Distribution of available reinvestment funds. Available funds are distributed as follows:

(A) For each qualifying report, HHSC subtracts the attendant compensation revenue per unit of service from the attendant compensation spending per unit of service and determines the number of full levels by which attendant compensation costs exceeded attendant compensation revenues. This number is multiplied by the add-on value of a level during the reporting period and the product is multiplied by the units of service provided during the reporting period as determined by HHSC.

(B) HHSC compares the sum of the products from subparagraph (A) of this paragraph to funds available for reinvestment.

(i) If the product is less than or equal to available funds, all enhancements for qualifying contracts are retroactively awarded for the reporting period.

(ii) If the product is greater than available funds, retroactive enhancements are granted beginning with the lowest level of enhancement and granting each successive level of enhancement until enhancements are granted within available funds.

(3) Non-qualification as pre-existing enhancements. Retroactively awarded enhancements do not qualify as pre-existing enhancements for enrollment purposes.

(4) Notification of reinvested enhancements. Qualifying facilities are notified of the award of reinvested enhancements in a manner determined by HHSC.

(ee) Disclaimer. Nothing in these rules should be construed as preventing providers from compensating attendants at a level above that funded by the enhanced attendant compensation rate.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704785
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: October 28, 2007
Proposal publication date: August 10, 2007
For further information, please call: (512) 424-6900

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SUBCHAPTER E. COMMUNITY CARE FOR AGED AND DISABLED

1 TAC §355.503

The amendments are adopted under the Human Resources Code, §32.021, which provides HHSC with the authority to adopt rules necessary to administer the federal medical assistance (Medicaid) program in Texas; Texas Government Code, §531.033, which authorizes the executive commissioner of HHSC to adopt rules necessary to carry out the commission's duties under Chapter 531; and Government Code §531.0055, which authorizes the Executive Commissioner to adopt rules for the operation and provision of health and human services by the health and human services agencies and to adopt or approve rates of payment required by law to be adopted or approved by a health and human services agency.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Chief Counsel
Texas Health and Human Services Commission
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For further information, please call: (512) 424-6900

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SUBCHAPTER C. REIMBURSEMENT METHODOLOGY FOR NURSING FACILITIES

1 TAC §355.311

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.311, concerning Medicaid Reimbursement Rates for State Veterans Homes, without changes to the proposed text as published in the August 10, 2007, issue of the *Texas Register* (32 TexReg 4845) and will not be republished.

This rule establishes the methodology for determining Medicaid reimbursement rates for state veterans homes. The amendment is necessary to bring the reimbursement methodology for state veterans homes into compliance with Section 202 of Public Law 108-422. The rule currently states that Veterans Administration (VA) per diem payments to the State of Texas Veterans Land Board for nursing home care are offset against per diem payment rates for Medicaid-eligible residents of a state veterans home. The amendment states that Veterans Administration per diem payments to the State of Texas Veterans Land Board for nursing home care are not offset against per diem payment rates for Medicaid-eligible residents of a state veterans home. The amendment also updates agency references from the legacy Department of Human Services to the current Department of Aging and Disability Services.

The 30-day comment period ended September 9, 2007, and HHSC did not receive any comments to the proposed rule.

The amendment is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021 and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704752
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: October 28, 2007
Proposal publication date: August 10, 2007
For further information, please call: (512) 424-6900

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1 TAC §355.312

The Texas Health and Human Services Commission (HHSC) adopts an amendment to §355.312, Reimbursement Setting Methodology--Liability Insurance Costs, without changes to the proposed text as published in the August 10, 2007, issue of the *Texas Register* (32 TexReg 4846) and will not be republished.

The rule establishes the methodology for determining Medicaid reimbursements for liability insurance costs in nursing facilities. The purpose of the proposed amendment is to correct an error in the due date for captive insurance premium taxes to be paid to the Texas Comptroller of Public Accounts (the Comptroller). This correction will make HHSC's due date equal to the Comptroller's due date and will bring HHSC in compliance with the Comptroller's requirements.

The 30-day comment period ended September 9, 2007, and HHSC did not receive any comments to the proposed rule.

The amendment is adopted under the Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; the Human Resources Code §32.021, and the Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and the Texas Government Code §531.021(b), which provides HHSC with the authority to propose and adopt rules governing the determination of Medicaid reimbursements.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704753
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: October 28, 2007
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For further information, please call: (512) 424-6900

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TITLE 25. HEALTH SERVICES

PART 1. DEPARTMENT OF STATE HEALTH SERVICES

CHAPTER 99. OCCUPATIONAL DISEASES

25 TAC §99.1

The Executive Commissioner of the Health and Human Services Commission (commission) on behalf of the Department of State Health Services (department) adopts an amendment to §99.1, concerning the reporting and control of occupational conditions without changes to the proposed text as published in the June 8, 2007, issue of the *Texas Register* (32 TexReg 3100), and the section will not be republished.

BACKGROUND AND PURPOSE

The amended section as adopted is necessary to comply with Health and Safety Code, Chapter 84, which requires the department to adopt rules concerning the reporting and control of occupational conditions; Acts, 1989, 71st Legislature, Chapter 678.

Government Code, §2001.039, requires that each state agency review and consider for readoption each rule adopted by that agency pursuant to the Government Code, Chapter 2001 (Administrative Procedure Act). Section 99.1 has been reviewed; and the department has determined that reasons for adopting the section continue to exist, because a rule on this subject is needed.

SECTION-BY-SECTION SUMMARY

The adopted amendment to §99.1 updates legacy agency names and organizational structure to reflect the post-consolidation operations of the department and the commission.

COMMENTS

The department, on behalf of the commission, did not receive any comments regarding the proposed rule during the comment period.

LEGAL CERTIFICATION

The Department of State Health Services General Counsel, Lisa Hernandez, certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agencies' legal authority.

STATUTORY AUTHORITY

The adopted amendment is authorized by Health and Safety Code, §84.003, which requires rules on the reporting of occupational conditions; and Government Code, §531.0055, and Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Health and Safety Code, Chapter 1001. The review of the adopted rule implements Government Code, §2001.039.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 5, 2007.

TRD-200704690
Lisa Hernandez
General Counsel
Department of State Health Services
Effective date: October 25, 2007
Proposal publication date: June 8, 2007
For further information, please call: (512) 458-7111 x6972

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 7. CORPORATE AND FINANCIAL REGULATION

SUBCHAPTER A. EXAMINATION AND FINANCIAL ANALYSIS

28 TAC §7.18

The Commissioner of Insurance adopts amendments to §7.18, concerning the adoption by reference of the *Accounting Practices and Procedures Manual* (Manual). The amended section is adopted with one minor technical change to the proposed text published in the August 3, 2007, issue of the *Texas Register* (32 TexReg 4735).

The amendments are necessary to adopt by reference the March 2007 version of the Manual with the exceptions specified in §7.18(c) and (d), and to delete existing paragraphs (1) and (7) in subsection (c) because they will become obsolete with the adoption of the March 2007 version of the Manual. The Manual, which is adopted and published by the National Association of Insurance Commissioners (NAIC), is a comprehensive guide to statutory accounting principles and contains Statements of Statutory Accounting Principles (SSAPs) that provide guidance to insurers and health maintenance organizations (HMOs), including accountants employed or retained by these entities, on how to properly record business transactions for the purpose of accurate statutory reporting. SSAPs provide a nationwide standard method of accounting, which most insurers and HMOs are required to use for statutory financial reporting guidance, thus providing a more consistent reporting of financial information for insurers and HMOs. SSAPs provide the source of statutory accounting principles for the Department when examining and analyzing financial reports and for conducting statutory examinations and rehabilitations of insurers and HMOs licensed in Texas, except where otherwise provided by law. Thus, the adopted amendments provide for more consistent and efficient regulation of insurance by providing a single source for accounting guidance. However, SSAPs do not preempt individual state legislative or regulatory authority.

The March 2007 version of the Manual adds three new SSAPs to the March 2006 version of the Manual: SSAP Nos. 94, 95 and 96. SSAP No. 94 establishes statutory accounting principles for transferable state tax credits. SSAP No. 95 replaces SSAP No. 28 and SSAP No. 90, paragraphs 18 - 20, and establishes updated statutory accounting principles for exchanges of nonmonetary assets. SSAP No. 96 establishes updated statutory accounting principles for settlement requirements for intercompany transactions. The amendments to §7.18 are necessary to include new paragraph (1) in subsection (c) to provide an exception to new SSAP No. 96 in that though settlement requirements for intercompany transactions are subject to the accounting treatment in SSAP No. 96, the amounts owed to the reporting entity must be settled by the due date in accordance with the written agreement, and intercompany balances must not exceed 90 days; otherwise, such balances shall be nonadmitted. SSAP No. 96 specifies a 90-day settlement period from the written agreement due date. The March 2007 version of the Manual also contains nonsubstantive modifications to SSAP Nos. 1, 3, 26, 30, 32, 43, 55, 59, 61, 62, 68, 72, and 88, which clarify language or change reference material.

The amendments to §7.18 also are necessary to implement HB 1590 enacted by the 80th Legislature, Regular Session, effective June 1, 2007, which amended the Insurance Code Chapter 425 by adding Insurance Code §425.071. HB 1590 authorizes the minimum standard of valuation under Subchapter B of Chapter 425 to include the use of lapse rates in the calculation of reserves for a secondary guarantee in universal life contracts issued after December 31, 2006. Actuarial Guideline No. 38 (AG 38) in the Manual reflects the NAIC's recently adopted recommended changes to the minimum standard of valuation that allow the use of lapse rates in the calculation of these reserves. The amendments to §7.18, which adopt the Manual by reference, adopt AG 38 in its entirety, including item 8C which specifically provides for the use of lapse rates in the calculation of reserves for a secondary guarantee in universal life contracts issued on or after January 1, 2007, and on or prior to December 31, 2010. The amendments to §7.18 supplement the reserve requirements in Subchapter EE of this title (relating to Valuation of Life Insurance Policies) for universal life policies. The amendments to §7.18 also update several Texas Insurance Code references due to the enactment of the nonsubstantive Insurance Code revision by the Legislature, correct internal references, and make minor grammatical corrections.

The Department's adoption has one minor, nonsubstantive change to the text of the rule as proposed. The change does not materially alter issues raised in the proposed rule, introduce new subject matter, or affect persons other than those previously on notice. Section 7.18(e) as proposed has been revised by adding the word "Senior" before "Associate Commissioner" for purposes of clarification and accuracy.

The adopted amendments to subsection (a) adopt by reference the March 2007 version of the Manual with deference to Texas statutes and regulations. The adopted version of the Manual includes all SSAPs adopted by the NAIC through December 31, 2006. The amended section as adopted also provides in subsection (c)(1) an exception to new SSAP No. 96 in that though settlement requirements for intercompany transactions are subject to the accounting treatment in SSAP No. 96, the amounts owed to the reporting entity must be settled by the due date in accordance with the written agreement and intercompany balances must not exceed 90 days; otherwise, such balances shall be nonadmitted. The adopted amendments also delete obsolete language relating to AG 38 in subsection (c)(7) because it is superceded by the new AG 38 in the March 2007 version of the Manual.

SUMMARY OF COMMENTS AND AGENCY RESPONSE.

Comment: The Department received a single comment, commending the Department for proposing amendments to §7.18, which are designed to implement the changes to AG 38 adopted in the March 2007 version of the Manual and to implement HB 1590, enacted by the 80th Legislature. The commenter states that the proposed changes are a critically important first step toward a system of principles-based reserving and will result in the accurate pricing of life insurance products that will benefit consumers while enhancing the Department's regulatory oversight.

Agency Response: The Department appreciates the comment.

NAMES OF THOSE COMMENTING FOR AND AGAINST THESE SECTIONS.

For: American Council of Life Insurers.

Against: None.

The amendments are adopted under the Insurance Code Chapters 32, 36, 401, 404, 421, 425, 426, 441, 802, 823, 841, 843, 861, and 862. Sections 401.051 and 401.056 (formerly Article 1.15 §1 and §6) mandate that the Department examine the financial condition of each carrier organized under the laws of Texas or authorized to transact the business of insurance in Texas and adopt by rule procedures for the filing and adoption of examination reports. Section 404.005(a)(2) (formerly Article 1.32 §3) authorizes the Commissioner to establish standards for evaluating the financial condition of an insurer. Section 421.001(c) (formerly Article 21.39) authorizes the Commissioner to adopt each current formula recommended by the NAIC for establishing reserves for each line of insurance. Section 425.071 authorizes the minimum standard of valuation under Subchapter B of Chapter 425 to include the use of lapse rates in the calculation of reserves for a secondary guarantee in universal life contracts issued after December 31, 2006, and provides that the Commissioner is authorized to adopt rules to implement §425.071. Section 425.162 (formerly Article 3.33 §9) authorizes the Commissioner to adopt rules, minimum standards, or limitations that are fair and reasonable as appropriate to supplement and implement the Insurance Code Chapter 425 Subchapter C. Section 426.002 (formerly Article 5.61(a)) provides that reserves required by §426.001 must be computed in accordance with any rules adopted by the Commissioner to adequately protect insureds, secure the solvency of the workers' compensation insurance company, and prevent unreasonably large reserves. Section 441.005 (formerly Article 21.28-A §§ 1 and 11) authorizes the Commissioner to adopt reasonable rules as necessary to implement and supplement Chapter 441 of the Insurance Code (Supervision and Conservatorship). Sections 32.041 and 802.001 authorize the Commissioner to furnish required financial statement forms. Section 823.012 authorizes the Commissioner to issue rules and orders necessary to implement the provisions of Chapter 823 of the Insurance Code (Insurance Holding Company Systems). Section 843.151 authorizes the Commissioner to promulgate rules as are necessary to carry out the provisions of Chapter 843 of the Insurance Code (Health Maintenance Organizations). Sections 841.004(b), 861.255(b) and 862.001(c) authorize the Commissioner to adopt rules defining electronic machines and systems, office equipment, furniture, machines and labor saving devices, and the maximum period for which each such class may be amortized. Section 36.001 provides that the Commissioner may adopt any rules necessary and appropriate to implement the powers and duties of the department under the Insurance Code and other laws of this state.

§7.18. National Association of Insurance Commissioners Accounting Practices and Procedures Manual.

(a) The purpose of this section is to adopt statutory accounting principles, which will provide insurers and health maintenance organizations, including accountants employed or retained by these entities, guidance as how to properly record business transactions for the purpose of accurate statutory reporting. The March 2007 version of the Accounting Practices and Procedures Manual (Manual) published by the National Association of Insurance Commissioners (NAIC) will be utilized as the guideline for statutory accounting principles in Texas to the extent the Manual does not conflict with provisions of the Insurance Code or rules of the department. The Commissioner reserves all authority and discretion to resolve any accounting issues in Texas. When making a determination on the proper accounting treatment for an insurance or health plan transaction, the Commissioner shall refer to the sources in paragraphs (1) - (6) of this subsection in the respective order of priority listed. Furthermore, §§3.1501 - 3.1505, 3.1605, 3.1606, 3.7004, 7.7, 7.85 and 11.803 of this title (relating to Annuity Mortality Tables, General Requirements, Statement of Actuarial Opinion Based on an Asset Adequacy Analysis, Contract Reserves, Subordinated Indebtedness, Surplus Debentures, Surplus Notes, Premium Income Notes, Bonds, or Debentures, and Other Contingent Evidences of Indebtedness, Audited Financial Reports, and Investments, Loans, and Other Assets), preempt any contrary provisions in the Manual.

(1) Texas statutes;

(2) department rules;

(3) directives, instructions, and orders of the Commissioner;

(4) the Manual;

(5) other NAIC handbooks, manuals, and instructions, adopted by the department; and

(6) Generally Accepted Accounting Practices.

(b) The Commissioner adopts by reference the March 2007 version of the Manual, with the exceptions and additions set forth in subsections (c) and (d) of this section, as the source of accounting principles for the department when examining financial reports and for conducting statutory examinations and rehabilitations of insurers and health maintenance organizations licensed in Texas, except where otherwise provided by law. This adoption by reference shall be applied to examinations conducted as of January 1, 2007 and thereafter, and also shall be used to prepare all financial statements filed with the department for periods after January 1, 2007.

(c) The Commissioner adopts the following exceptions and additions to the Manual:

(1) Settlement requirements for intercompany transactions are subject to the accounting treatment in Statement of Statutory Accounting Principles (SSAP) No. 96, except that amounts owed to the reporting entity shall be settled by the due date in accordance with the written agreement and the requirements of §7.204 of this title (relating to Commissioner's Approval Required). Intercompany balances shall not exceed 90 days; otherwise such balances shall be nonadmitted.

(2) Retrospective premiums must be billed within 60 days of computation and audit premiums must be billed within 60 days of the completion of the audit in determining the beginning date from which the 90 day period is calculated to determine admissibility of uncollected premium balances under SSAP No. 6.

(3) Electronic machines, constituting a data processing system or systems and operating systems software used in connection with the business of an insurance company acquired after December 31, 2000, may be an admitted asset as permitted by Insurance Code §§841.004, 861.255, 862.001, and any other applicable law and shall be amortized as provided by the Manual. All such property acquired prior to January 1, 2001, may be an admitted asset as permitted by Insurance Code §§841.004, 861.255, 862.001, and any other applicable law, and shall be amortized in full over a period not to exceed ten years.

(4) Furniture, labor-saving devices, machines, and all other office equipment may be admitted as an asset as permitted by the Insurance Code §§841.004, 861.255, 862.001, and any other applicable law and, for such property acquired after December 31, 2000, depreciated

in full over a period not to exceed five years. All such property acquired prior to January 1, 2001, may be an admitted asset as permitted by Insurance Code §§841.004, 861.255, 862.001, and any other applicable law, and shall be depreciated in full over a period not to exceed ten years.

(5) Goodwill, as reported on a regulated entity's statutory financial statements as of December 31, 2000, and any additional goodwill acquired thereafter, beginning January 1, 2001, shall be admitted as an asset and accounted for as permitted by SSAP Nos. 61 and 68. All other amounts of goodwill, including, but not limited to, such amounts that may have been previously expensed, shall not be allowed as an admitted asset. However, notwithstanding the provisions of SSAP Nos. 61 and 68, all methods of non-insurer subsidiary and affiliate valuation permitted by Insurance Code §§823.301 - 823.307 may be used for the purposes of goodwill calculation.

(6) All certificates of deposit, of any maturity, may be classified as cash and are subject to the accounting treatment contained in SSAP No. 2, notwithstanding the provisions of SSAP No. 26.

(d) A farm mutual insurance company, statewide mutual assessment company, local mutual aid association, or mutual burial association that has less than $5 million in annual direct written premiums need not comply with the Manual.

(e) In the event a domestic insurer desires to deviate from the accounting guidance in a Texas statute or any applicable regulation, the insurer shall file a written request for a permitted accounting practice. Such filing shall be made with the Senior Associate Commissioner, Texas Department of Insurance, Mail Code 305-2A, P.O. Box 149104, Austin, Texas 78714-9104 at least 30 days before filing the financial statement affected by the deviated accounting practice. Insurers shall not use deviated accounting practice without the department's prior approval.

(f) This section shall not be construed to either broaden or restrict the authority provided under the Insurance Code to insurers, including health maintenance organizations.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 2, 2007.

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Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
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For further information, please call: (512) 463-6327

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 65. WILDLIFE

SUBCHAPTER O. COMMERCIAL NONGAME PERMITS

31 TAC §§65.325, 65.327, 65.331

The Texas Parks and Wildlife Commission adopts amendments to §§65.325, 65.327, and 65.331, concerning commercial nongame permits, with changes to the proposed text as published in the April 20, 2007, issue of the *Texas Register* (32 TexReg 2259).

The changes to §§65.325, 65.327, and 65.331 are nonsubstantive, except as noted. In reviewing the proposed rules in light of public comment, the department determined that the provisions of the rule as adopted could be reorganized into a more logical structure.

The change to §65.325, relating to Applicability, rewords the provisions of proposed subsection (a) to include the statutory definition of nongame wildlife from Parks and Wildlife Code, §67.001; however, the definition adopted for the purposes of the subchapter does not include invertebrate wildlife. The subsection as adopted also contains a clarification that the subchapter applies to the eggs of nongame wildlife. Although eggs are nongame wildlife, the department believes that an explicit acknowledgment of that fact will help to prevent confusion.

The change to §65.325 reconfigures proposed subsection (b) by creating a comprehensive list of vertebrate animals to which the provisions of the subchapter do not apply, eliminating certain provisions, and relocating other provisions elsewhere in the restructured rule.

The change to §65.325(b) adds coyotes, mountain lions, bobcats, rabbits, and American bison to the list of vertebrate species to which the subchapter does not apply. The overwhelming majority of coyotes, mountain lions, and bobcats are taken as part of predator control efforts, rather than for commercial purposes; therefore the department has chosen to exempt these species from the applicability of the subchapter. Rabbits are included on the list of species to which the provisions of the subchapter are not applicable because they are very common and popular with hunters; if rabbits were not excluded, hunters would need to purchase a nongame permit to possess more than 25. American bison are included on the list because technically they are nongame wildlife; however, the department does not believe that the rules should include bison because with the exception of the department's state bison herd, all other bison in the state are hybrid bison/cattle that are part of animal husbandry operations used for food production. The department has added a categorical exception for threatened species listed in 31 TAC Chapter 65, Subchapter G, because the take and possession of threatened species are prohibited under that subchapter and under federal law. Fish have been removed from the list of excepted species because they are excluded by the statutory definition of nongame wildlife added to §65.325(a).

The change to proposed §65.325(b) also consolidates proposed subsections (c) and (d) into a new subsection (c), which would "grandfather" private collections and provide a grace period for commercial nongame dealers to divest their inventories of species that will no longer be lawful to use for commercial activities. The change also recalculates the dates by which private collections must be reported to the department and commercial dealers must divest certain species in order to provide adequate time for those activities to take place and to provide a specific date for such action to avoid confusion.

The change to proposed §65.325 also relocates two provisions. Proposed subsection (b)(2) and (3), which address processed products and foodstuffs made from nongame wildlife, are being

moved to adopted §65.327(b), which lists all permit privileges and restrictions in a single subsection, as §65.327(b)(4) and (5).

The change to §65.327, concerning Permit Required, combines proposed subsections (a) and (b) to create a comprehensive section identifying the activities to which the subchapter applies and for which a permit is needed. Proposed subsections (a) and (b) were nearly identical; each subsection identified the activities to which the subchapter applies, but subsection (b) contained additional language prescribing a permit requirement. The department intends, by combining the two subsections, to create a single, authoritative statement concerning the applicability of the subchapter.

The change to §65.327 creates a new subsection (b) to address permit privileges and restrictions in a comprehensive manner. In the proposed text, permit privileges and restrictions were located in various parts of the sections being amended. In reviewing public comment, the department determined that such provisions could be more logically organized under a single heading. Therefore, the new section is structured to address: 1) permit privileges for nongame dealer permit holders, 2) permit privileges for nongame permit holders, and 3) activities involving nongame species that may be engaged in without holding a permit, including activities relating to processed products and food production and sale.

To delineate permit privileges and restrictions for holders of nongame dealer permits, the change to §65.327 creates a new subsection (b)(1), which consists of new subparagraph (A) (proposed §65.327(b)), allowing nongame dealers to collect nongame wildlife from the wild; new subparagraph (B) (proposed §65.327(d)), allowing nongame dealers to sell nongame wildlife to anyone; and new subparagraph (C) (proposed §65.327(i)), which specifies that nongame dealers may acquire nongame wildlife only from other persons permitted to sell nongame wildlife in Texas or from a lawful out-of-state source. The change also creates a new subparagraph (D) in response to public comment. The department received comments from pet dealers and hobbyists who stated that nongame dealers should be allowed to buy, sell, import, and export indigenous species provided those animals did not come from the wild in Texas. The department agreed with the comment. New subparagraph (D) would do the following: allow the import of indigenous species of nongame wildlife for sale, resale, or export, provided the wildlife is not released or commingled with native nongame wildlife; require the permittee to possess documentation establishing that the nongame wildlife was lawfully obtained in and transported from another state; require the permittee to notify the department within 24 hours of shipping such nongame wildlife out-of-state or receiving such nongame wildlife from out-of-state; and require the permittee to maintain the records required by the section for a period of two years and to make such records available to department employees acting within the scope of official duties.

To delineate permit privileges and restrictions for holders of nongame permits, the change to §65.327 creates a new subsection (b)(2), which consists of new subparagraphs (A) - (C). New subparagraph (A) provides that the holder of a nongame dealer permit may collect the wildlife listed in §65.331(d) (which lists the nongame wildlife that may lawfully be used in a commercial activity) from the wild. New subparagraph (B) stipulates that the holder of a nongame permit may purchase or acquire nongame wildlife listed in §65.331(d) (the list of nongame species lawful for use in commercial activities) only from the holder of nongame dealer permit or from a lawful out-of-state source. The authorization for a nongame permit holder to purchase nongame wildlife was not explicitly acknowledged in the proposed rules, but was implied since it was not prohibited. The department has decided that this authorization should be explicitly stated in the rules. New subparagraph (C) (proposed §65.327(c)) stipulates that the holder of a nongame permit may sell only to the holder of a nongame dealer permit.

To delineate the activities involving nongame wildlife that may be engaged in by anyone (without a permit), the change to §65.327 creates a new subsection (b)(3), which consists of new subparagraphs (A) and (B). New subparagraph (A) (proposed §65.327(e)) establishes a possession limit of six specimens of any nongame species not listed in §65.331(d) (i.e., species unlawful for use in commercial activities) for persons without a permit, provided the nongame wildlife is not used in a commercial activity. New subparagraph (B) (proposed §65.327(f)) establishes a possession limit of 25 specimens (in the aggregate) of nongame wildlife listed in §65.331(d), meaning that if a person possesses more than 25 specimens or engages in a commercial activity, the appropriate permit must be in possession.

The change to §65.327 adds new subsection (b)(4) - (6) as noted earlier. The change consists of several provisions governing processed products and foodstuffs. New paragraph (b)(4) (proposed §65.325(b)(3)) stipulates that a permit is not required for a person to sell nongame wildlife listed in §65.331 as food, provided the nongame wildlife is prepared for and ready for immediate consumption and the person retains a receipt identifying the source of the nongame wildlife. New paragraph (5) (proposed §65.325(b)(2)) stipulates that no permit is required to purchase, possess, or sell processed products made from nongame wildlife listed in §65.331. New paragraph (6) (proposed §65.327(g)) provides that no person may take nongame wildlife listed in §65.331 and subsequently treat it to create a processed product unless that person holds a nongame dealer permit.

The change to §65.327 creates a new subsection (c) to address the requirements of the subchapter that relate to the conditions under which a permit must be physically possessed by a person. New subsection (c)(1) (proposed §65.327(l)) clarifies that a person engaging in the take of nongame wildlife must possess a hunting license in addition to a nongame or nongame dealer permit. New subsection (c)(2) (proposed §65.327(j)) provides that a person must physically possess an appropriate permit on their person while engaged in any activity subject to the provisions of the subchapter, that a separate permit is required for each permanent place of business, and sets forth the conditions under which persons to whom a permit has not been issued may engage in permitted activities as a consequence of being an employee of a permittee.

The change to §65.327 creates a new subsection (d) (proposed §65.327(m)) to define the period of validity of permits.

The change to §65.327 creates a new subsection (e) that was not in the proposed text. The department received public comment expressing concern about the rules' implications for persons who transship nongame wildlife through Texas to points beyond. The department has therefore added the new subsection to clarify that the rules do not apply in such instances.

As proposed, §65.331 was titled "Species Authorized for Commercial Activity" and consisted of subsection (a), setting forth the department's intent to periodically evaluate the list of species

approved for use in commercial activity to determine if species should be added or removed, and subsection (b), which listed the species approved for use in commercial activities. In restructuring the rule as adopted, the department decided to relocate several provisions that were proposed as parts of other sections. Accordingly, the title of the section had been changed to "Commercial Activities."

As adopted, §65.331 retains the language of proposed subsection (a). The change to §65.331 adds a new subsection (b) to allow for the possession, transportation, sale, importation, or exportation of common snapping turtle, red-eared slider, and softshell turtles by holders of nongame and nongame dealer permits. The rules as proposed (§65.331(b)) prohibited the take of all species of turtles; however, after receiving testimony from the public, including members of the scientific community, the commission instead adopted a provision that prohibits the take of all nongame wildlife (including turtles) on public lands or from public waters, while allowing for the commercial take of common snapping turtle, red-eared slider, and softshell turtles on private land or water. The change also prohibits the possession while on public waters of nets or traps capable of being used to catch turtles, with an exception for dip nets and minnow traps, which is necessary to enforce the prohibition on the take of turtles from public waters and lands.

The change to §65.331 also adds a new subsection paragraph (c) to create an offense for the act of taking or attempting to take nongame wildlife for commercial purposes from public land or water. The rule as proposed would have prohibited the commercial harvest of all species of turtles anywhere in the state. In response to public comment, the department adopted provisions allowing the commercial take of three species of turtles from private lands and waters. The change is necessary to create an enforceable provision to allow for the prosecution of persons who unlawfully harvest turtles on public lands or waters, and has been expanded to include all nongame wildlife because the commission, in discussing the topic of commercial turtle harvest, chose to protect all nongame wildlife on public lands from commercial harvest activities.

The change to §65.331 redesignates proposed subsection (b), which listed the species of nongame wildlife lawful for use in commercial activities, as new subsection (d). The contents of the list remain unchanged.

The change to §65.331 adds new subsection (e), which lists the species of wildlife unlawful for use in commercial activities. The department received public comment stating that under the provisions of Parks and Wildlife Code, §67.004(b), department regulations must list species by common and scientific name. Although the department does not agree that this list is required by statute, it is included for the sake of clarity and ease of enforcement.

Under Parks and Wildlife Code, Chapter 67, "nongame wildlife" means those species of vertebrate and invertebrate wildlife indigenous to Texas that are not classified as game animals, game birds, game fish, fur-bearing animals, endangered species, alligators, marine penaeid shrimp, or oysters. Chapter 67 authorizes the commission to "establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species," and authorizes the department to issue permits for the taking, possession, propagation, transportation, sale, importation, or exportation of a nongame species of fish or wildlife if necessary to properly manage that species, and to charge a fee for such permits.

Nongame species comprise over 90 percent of the wildlife species that occur in Texas. The department conducts ongoing research on many nongame species, and monitors research conducted by others. In 1999, the Parks and Wildlife Commission adopted the first regulations expressly intended to manage nongame wildlife in the state. The purpose of the program is to function as a 'canary in the coal mine' by tracking collection and sales activities involving specific species of nongame wildlife to provide the department with an early warning of possible declines in species populations. Under the current rule, all persons engaging in commercial activities involving affected species listed in the rule are required to possess a nongame permit or nongame dealer permit. A person with a nongame permit is authorized to sell species to a person with a nongame dealer permit, but may not sell species to the general public. However, a person with a nongame dealer permit is authorized to sell species to other permitted dealers and to the general public. In addition, persons with a nongame dealer permit are currently required to report sales and purchases to the department. The department uses the reported data to gauge potential impacts to native ecosystems and assist in determining if further regulatory protection is warranted.

Based on data reported to and the information collected by the department, the department has determined that additional protective measures are needed for nongame species. Under the current rule, no person is required to furnish commercial collection information on any species that is not on the list of affected species. Therefore, if a commercial market were to develop around a species not on the list of affected species, the department would not necessarily be able to detect it and develop additional regulatory measures to manage populations.

Historically, the most intensive management and research activities in the United States and Texas have been focused on game species popular with sport hunters, such as deer, turkey, pronghorn antelope and others. However, game species represent a small fraction of the overall number of species in any ecosystem; in Texas, eight species of wildlife are designated by statute as game animals, whereas there are approximately 1,100 species of nongame vertebrate wildlife.

The genesis of modern game species management came about as a result of unregulated commercial exploitation of wildlife resources. By the middle of the 20th century, many species of wildlife were in serious decline or in danger of extirpation in many parts of the United States and Texas as a result of unregulated, large-scale, commercial harvest. Some species became extinct, such as the passenger pigeon, which was once thought to be inexhaustible. Other native Texas species, such as the American bison and the whooping crane, were driven near extinction, and significant resources have been spent to bring them back. Due to regulatory and management efforts, however, most game species are now thriving. The rules as adopted are intended to manage nongame species and prevent their depletion.

The rules replace the current list of affected species with a list of species lawful for use in commercial activities (hereafter, the "white list"). All other species of nongame are unlawful for use in commercial activities. In determining the species for which commercial activities are permitted, the department consulted the existing scientific literature and with members of the regulated community, herpetological societies, and academic specialists, soliciting input from approximately 300 people. The goal of the con-

sultations was to develop a broad consensus concerning those species of nongame wildlife thought to be able to withstand some level of collection activity, based on distribution, abundance, and life cycle,, with the understanding that there would be some type of mandatory reporting concerning commercial activity.

Among the nongame species of concern, scientists have especially expressed concern about Chelonian species (turtles). Because of factors such as delayed sexual maturity, long lifespans, and low reproductive and survival rates, turtles are highly sensitive to population alterations, especially in older age classes. The presence of turtles in some areas should not be taken as evidence that populations in those areas are necessarily viable. Long lifespans, long generation times, and relatively slow growth may give the appearance that populations are stable, even after recruitment has ceased or populations reach levels below which recovery is possible. Impacts to turtle populations, such as the loss of important nesting areas or unsustainable mortality of adults, may remain undetectable until populations reach critical levels or become extirpated. Known limiting factors such as water pollution, road mortality, and habitat loss are important components in turtle declines, but commercial collecting efforts in the wild intensify the impact of those threats by removing large numbers of adults and older juveniles from wild populations. The collection for food markets has devastated turtle populations in Asia, the destination of the bulk of turtles commercially collected in Texas. It is axiomatic that shifting the Asian demand for turtles to North American populations could result in similar impacts if commercial activity is not regulated. Therefore, the new rules prohibit the commercial collection of all turtle species on public lands and waters in the state and the commercial collection of all turtles except red-eared sliders, common snapping turtles, and soft shell turtles on private property.

Scientific evidence indicates that lakes that have been commercially harvested for turtles have a significantly lower catch-per-unit-effort than did lakes that had not been commercially harvested, which indicates that commercial collection is efficient in reducing turtle populations locally. In the literature examined by the department (cited later in this preamble), there is a consistent voice of concern about the sustainability of current harvest levels of turtles and agreement that stronger regulation is necessary, at least until more is known about the impacts of collection on wild populations. Much of the concern of the scientific community stems from the relationship of collection to the natural history of turtles, particularly their delayed maturation and resulting low recruitment into adult-class animals. The youngest onset of maturity reflected in the literature is in painted turtles, at 6 - 8 years for females. Other species tended to mature much later, with onset ages reported as high as 20 years.

Analysis of turtle population demographics consistently showed skewing to the adult age categories--the mature specimens most sought by commercial collectors for use as food product. This characteristic reflects the natural history of turtle species and their strong dependency on adult survivors to offset high mortality rates in eggs and juvenile categories. This characteristic alone makes it unlikely that populations can remain stable when high numbers of adults and older juveniles are steadily removed from a population.

The preferred targets of collectors are the adult and older juvenile age classes. Studies cite this (and other factors) in asserting that collection from the wild is a factor contributing to the decline of particular species, noting that, as a result, some states have banned commercial collection of wild-caught herpetological species either entirely or in part. A review of turtle regulations in the rest of the United States reveals that 38 states prohibit the take of at least one species of turtle, 34 states limit the commercial and/or recreational take of turtles in some fashion, and at least eight states prohibit the sale of native wildlife altogether.

Turtle collection in the United States and in Texas in particular is significant. The literature indicates that nationwide, more than 26 million wild-caught reptiles were exported from the U.S. between 1998 and 2002. In Texas, data from the U.S. Fish and Wildlife Service indicates that turtle exports increased to more than 100,000 individuals annually between 1996 and 2000. Based on the department's reporting data and the scientific literature, it is likely that actual collection effort is significantly underreported by the regulated community and/or the current system does not completely account for collection effort. Some of these animals may represent re-exports (turtles captured outside of Texas, but bought and resold within Texas for export). Current reporting does not allow for tracking re-exports but several species reported as exported from the state do not occur naturally within our borders; however, these were very minor numbers.

Literature Reviewed.

In developing the rules as adopted, the department reviewed and considered the following scientific publications:

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Regulatory Impact Analysis.

Although Government Code, §2001.0225, Regulatory Analysis of Major Environmental Rules, does not apply to the rules as adopted, the department nonetheless has assessed: all information submitted to it, consistent with generally accepted scientific standards; actual data where possible; and assumptions that reflect actual impacts that the regulation is likely to impose. TPWD finds that, compared to the alternative proposals considered and rejected, the rule will result in the best combination of effective-

ness in obtaining the desired results and of economic costs not materially greater than the costs of any alternative regulatory method considered. The rule as adopted lessens economic effects on businesses in comparison to the rule proposal, inasmuch as the adopted rule allows continued collection of three common species of turtles on private land and water.

The department received 1,566 comments supporting adoption of the proposed rules.

Written comments in favor of the proposed rules were received from the following academics and scientists: Lee Fitzgerald, Associate Professor/Faculty Curator of Amphibians and Reptiles, Texas A&M University; John Iverson, Dept. of Biology, Earlham College; Nedim C. Buyukmihci, Emeritus Professor of Veterinary Medicine, University of California School of Veterinary Medicine; Steven G. Platt, Department of Biology, Sul Ross State University; Edward O. Moll, Professor Emeritus, Eastern Illinois University, Adjunct Professor, University of Arizona; Justin D. Congdon, Professor Emeritus, Savannah River Ecology Laboratory, University of Georgia; Michael Forstner, Associate Professor, Department of Biology, Texas State University; Donald R. Clark, Research Scientist Emeritus, Patuxent Wildlife Research Center, United States Department of the Interior; Rick Hudson, Conservation Biologist, Fort Worth Zoo; Deborah Cowman, Institute for Science Technology and Public Policy, Texas A&M University; Yuichirou Yasukawa, Researcher, Takada Reptile and Wildlife Research Institute; Aaliyah Green, Graduate Research Scientist, Savannah River Ecology Laboratory, University of Georgia; Carl J. Franklin, Biological Curator, Amphibian and Reptile Diversity Research Center, University of Texas at Arlington; James F, Koukl, Associate Professor of Biology, University of Texas at Tyler; James R. Ott, Associate Professor, Department of Biology, Texas State University; Richard C. Vogt, Curator of Reptiles and Amphibians, Instituto Nacional de Pesquisas da Amazônia (INPA), Coordenação de Pesquisa em Biologia Aquática (Brazil); Anders Rhodin, Director, Chelonian Research Foundation; Ronald Brooks, Professor Emeritus, Department of Zoology, University of Guelph (Canada); Thomas R Simpson, Professor, Department of Biology, Texas State University; Travis LaDuc, Texas Herpetological Society; Francis Rose, Professor, Department of Biology, Texas State University; William R. Belzer, Professor, Department of Biology, Clarion College; James R. Dixon, Professor Emeritus of Biology and Curator Emeritus of Amphibians and Reptiles, Texas A&M University; Peter Paul van Dijk, Director of Tortoise and Freshwater Turtle Biodiversity, Conservation International; Joe Flanagan, Director of Veterinary Services, Houston Zoo; Heather Lowe, Assistant Curator of Conservation and Science; Day Ligon, Department of Zoology, Oklahoma State University; Kerri Mitchell, doctoral candidate, Behavioral Ecology, University of Texas-Arlington.

At the commission hearing on May 24, 2007, a number of scientific experts testified in support of the proposed rules. Dr. Peter Paul van Dijk, Director of the Tortoise and Freshwater Turtle Biodiversity Program of Conservation International and a member of the International Union of Concerned Scientists--Tortoise and Freshwater Turtles Specialist Group, testified about commercial overharvest of turtles. Dr. van Dijk testified that Vietnam and Bangladesh had been "completely emptied of their turtle populations", and that Indonesia, Malaysia, Cambodia and Laos and Myanmar were next in line. Dr. van Dijk testified: "What we have seen are three- to five-year boom and bust cycles per country, per area." Once populations collapse, the trade moves on. Since the commercial food trade targets mature females, populations are slow to recover, and might never do so.

Dr. Michael Forstner, Professor of Biology, Texas State University, also supported the proposed rules. Dr. Forstner discussed data he has collected since 1994. His study found that it took twelve years for the first adult turtle to return to a harvested area, and that the population of turtles after harvest had a different balance between species than the pre-harvest population. He gave the example of the diamondback terrapin (Malaclemys), a once-plentiful species that supported a "tremendous" commercial fishery on the east coast of the United States. The species collapsed, and has taken 50 years to recover to the point where some commercial harvest might be possible

Dr. Thomas Simpson, Professor of Biology, Texas State University, testified in support of the rules. Dr. Simpson told the TPW Commission that "there is no documented, sustained, unlimited harvest of any wildlife species in this nation or worldwide. It just cannot happen; it's not sustainable . . . turtles face tremendous natural mortality, and when you add on that a commercial harvest, it becomes unsustainable very quickly."

Other scientific experts who testified at the May 24, 2007 commission meeting in support of the proposed rules include: Dr. Francis Rose, Professor of Biology, Texas State University; Dr. Joseph Flanagan, Director of Veterinary Services, Houston Zoo; Ms. Heather Lowe, Assistant Curator of Conservation Science, Fort Worth Zoo; and Dr. James R. Dixon, Professor Emeritus of Biology, Texas A&M University.

The department also received written testimony in support of the proposed rules from Professor Steven G. Platt of Sul Ross State University; Dr. James F. Koukl (Professor of Biology, University of Texas at Tyler); Mr. Rick Hudson (Conservation Biologist, Fort Worth Zoo); Dr. Ronald Brooks (Professor Emeritus of Zoology, University of Guelph); Dr. Anders G.J. Rhodin (Chair, International Union of Concerned Scientists, Tortoise and Freshwater Turtle Specialist Group; Director, Chelonian Research Foundation); Dr. Yuichiro Yasakawa (Researcher, Takada Reptiles and Wildlife Research Institute); Dr. Richard C. Vogt (Curator of Reptiles and Amphibians, Instituto Nacional de Pesquisas da Amazonia); Dr. John Iverson (Professor of Biology, Earlham College); Dr. Nedim C. Buyukmihci (Emeritus Professor of Veterinary Medicine, University of California School of Veterinary Medicine); and Dr. William Belzer (Professor of Biology, Clarion College).

Dr. Justin Congdon, Professor Emeritus of Biology, University of Georgia, wrote: "...I have studied the demography and life history, ecology, and bioenergetics of turtles for the past 33 years . . . One of the particular topics of my demographic research had been making stable cohort models of harvest impacts based on documented stable populations of Blanding's and Snapping turtles . . . Compared to most organisms, all turtles are long-lived--with some longer-lived than others. In association with potentially long lives, their life histories consist of co-evolved trait-values such as delayed sexual maturity, low fecundity, and a requirement for high adult and average juvenile survivorships. The suite of co-evolved traits of turtles and other long-lived organisms do not lend themselves to commercial harvests, and unregulated commercial harvests of sea-mount fishes, sharks, lobster, and other long-lived organisms has almost always led to population crashes . . . Whereas the Asian demand for our wildlife is insatiable, the attempt to fill that demand will certainly result in extirpation of some turtle populations and will lead to the

need for more CITES protections for turtle species in Texas. At worst, continued harvest may lead to some species extinctions."

The Texas Wildlife Association, Armand Bayou Nature Center, Box Turtle Conservation Trust, Gulf Coast Turtle and Tortoise Society, Conservation International, Wildlife Rescue and Rehabilitation, South Plains Wildlife Rehabilitation Center, Sierra Club, Turtle Survival Alliance, World Conservation Union/Species Survival Commission Tortoise and Freshwater Turtles Specialist Group, and Texas Conservation Alliance commented in support of adoption of the proposed rules.

The department received 678 comments opposing adoption of all or part of the proposed rules. Of those comments, 97 articulated a reason or rationale for opposing adoption. Dark Hammock Turtle Farm (Okeechobee, Florida), the Coalition of Concerned Pet Dealers, and U.S. Global Exotics, Inc., commented in opposition to adoption of the rules as proposed.

In addition to a variety of brief, cursory, or concise comments, the department received three comments of an extensive nature. In the interests of assisting those parties in determining that all aspects of their comments have been addressed and responded to, the department has chosen to respond to each of the comments as a body, designating them as Comment 1, Comment 2, and Comment 3, respectively. The remaining comments, grouped by topic, accompanied by the department's response to each, follow.

Comment 1.

The commenter stated that the proposed ban on the collection, possession, and sale of all turtles was based on unsupported speculation. The department disagrees with the comment and responds that numerous scientific investigations around the world have shown a positive correlation between unregulated collection of chelonians and precipitous population declines that in some cases have resulted in virtual or actual extirpation. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that the rules would place Texas pet dealers at a competitive disadvantage with pet dealers in other states. The department disagrees with the comment and responds that a business model directly dependent on the perpetual, unregulated exploitation of a public resource should not take precedence over the regulatory duty of the department. No changes were made as a result of the comment.

The commenter stated that many species prohibited from commercial use are in fact not commercially traded now. The department acknowledges that there may not be commercial trade in every species for which commercial collection is prohibited under the rules. However, prohibiting the commercial use of a species of nongame achieves the purpose of protecting that species from the demonstrated threat of commercial exploitation. No changes were made as a result of the comment.

The commenter stated that the department's proposed rule bans the collection and sale of all turtles without regard to how common the species may be. The department agrees that the proposed rule prohibited specified commercial activities for all species of turtle. Because of turtles' delayed sexual maturity, long lifespans, and low reproductive and survival rates, perceived current abundance, relative or absolute, of turtle species, is not necessarily indicative of the overall health of the population. The intent of the rule is to protect indigenous nongame wildlife and the ecosystems that support them. History gives us many examples of species thought to be so common as to be inexhaustible--whales, the American bison, the passenger pigeon--that were subjected to unregulated exploitation, particularly for food or fashion markets, and consequently were pushed to the brink of extirpation or were extirpated. Numerous scientific investigations around the world have shown a positive correlation between unregulated collection of chelonians and precipitous population declines that in some cases have resulted in virtual or actual extirpation. The rule as adopted, however, recognizes that there are three species of turtle which are currently believed to be able to withstand some collection for commercial purposes; therefore, the rule as adopted allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters. The rule also imposes reporting requirements which are intended to assist the department in monitoring these three species of turtle.

The commenter stated that the department's assertion that the shift of Asian demand to America is an unfounded fear, and that there is no evidence that demand for wild-caught turtles will exceed sustainable levels. The department disagrees with the comment and responds that it is a well-documented fact that Asian demand for turtle meat, as it has progressed from country to country, has led to severe population declines and in some cases, extirpation, of chelonian species throughout Asia. The department is not aware of any study that offers a scientifically valid refutation of that fact. Having exhausted Asian species of chelonians, Asian demand (which is huge and growing) is shifting to the rest of the world, especially those places where commercial take is unregulated, such as Texas (Van Dijk, et al, 2000). It is axiomatic that the same pressure, applied under the same conditions, will produce the same result. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that the department chose not to inspect collection logs maintained by nongame permit holders to determine the numbers of animals taken from the wild and that the proposed rules do not provide for any meaningful data on turtle collection. The department agrees that collection logs are not required to be submitted to the department. The current rules allow nongame permit holders to sell nongame wildlife only to commercial nongame permit holders, who, in turn, are the only people who may buy and subsequently sell nongame wildlife. Commercial nongame dealer permit holders are required to report annually on the numbers of animals bought and sold. Therefore, if all persons buying and subsequently selling animals collected from the wild have the proper permit for doing so, and are reporting as required, the department records should reflect all harvest from the wild. The department also is aware that there are small-scale captive breeding operations involving nongame wildlife, primarily hobbyists, but such operations are not believed to be on a scale that is statistically or biologically significant. The department is aware of one large-scale captive breeding operation involving nongame species, a commercial turtle-farming operation. On that basis, the department concludes that most if not all nongame wildlife entering commercial trade in Texas is obtained from the wild. The rules as adopted will provide data on turtle collection, as it is illegal to sell any turtle for commercial purposes without reporting that fact to the department. No changes were made as a result of the comment.

The commenter stated that the department's interest in protecting wild turtle populations is best furthered by the enforcement

of current reporting requirements, encouraging full reporting, and obtaining data on the actual collection from the wild. The department disagrees with the comment and responds that the regulation of take from the wild by limiting commercial harvest to the three most populous species on private property is expected to have a positive impact on populations and will simplify enforcement. The department also responds that almost all commercial activity with respect to turtles involves turtles taken from the wild and that accurate and timely reporting by commercial nongame dealers is sufficient to provide useful data on commercial activity involving wild-caught turtles. The department further responds that it will continue to enforce the rules and that full reporting by persons who engage in commercial activities is mandated by the rules as adopted. No changes were made as a result of the comment.

The commenter stated that the department has contradicted itself by stating that data on commercial activity is used to gauge potential impacts and to assist in determining if further protection is warranted, yet admits that it has no collection information on some animals affected by the rule. The commenter stated that the department chooses not to gather data to determine if there is any impact resulting from collection by hobbyists or for the pet trade and wants to criminalize collection and possession without knowing the facts. The department disagrees with the comment. As explained in the preamble to the proposed rule, the department has a duty to manage nongame species, but does not intensively monitor all of the hundreds of nongame species in the state. Therefore, the current reporting system is used as an indicator of commercial activity. The department consulted many collectors, dealers, academics, and members of the scientific community to determine which species are popular in commercial trade and the impacts to those species resulting or likely to result from continued collection. As a result, the department placed many of those species on the "white list" of lawful species after determining that continued commercial collection posed no immediate threat to populations or ecosystems. The species that were not placed on the "white list" are not unlawful to collect or possess, but are unlawful to collect or possess for commercial purposes. The rules as proposed and adopted allow for personal, noncommercial collection. The species that are not on the "white list" are either known or suspected to be susceptible to threats from overcollection or are not known to be subject to commercial trade. The department believes that all such species are in need of management, and prohibiting commercial trade is a management strategy that is biologically effective as a manner of ensuring the continued ability of such species to perpetuate themselves and affects no economic interest, since to the department's knowledge there is little or no commercial activity involving these species. The department further responds that the rule as adopted provides for the periodic review of nongame species status to determine if inclusion on or removal from the "white list" is warranted. No changes were made as a result of the comment.

The commenter stated that a ban on commercial turtle collection which would eliminate the need for reporting of commercial turtle collection will make it difficult or impossible to determine the impact or development of a commercial trade. The department responds that the rule as adopted would allow the continued commercial collection of three species of turtles from private property and will require reporting of this commercial activity. The department has determined that unregulated commercial turtle collection is a threat to native species and ecosystems and has responded accordingly. Persons who engage in commercial activities with the three species lawful for collection on private property will be required to report collections, purchases, and sales.

The commenter stated that although the proposed rules contemplate the development of a policy for periodically evaluating whether a species should be included on or removed from the "white list," the proposal did not articulate the particulars of the policy or commit to a timeframe for implementing it. The department acknowledges that the rule does not provide details regarding revisions to the "white list," but responds that it intends, in good faith and in fulfillment of its statutory duties, to develop the policy in a timely matter. The department proposed the provision to ensure that the regulated community has a mechanism for approaching the department with evidence that action is warranted. No changes were made as a result of the comment.

The commenter stated that the department has no justification for banning the sale of captive-bred animals or animals that have been collected out-of-state. The department disagrees with the comment and responds that Parks and Wildlife Code, Chapters 1 and 67 authorize the department to regulate species of nongame wildlife that are indigenous to the state, including the propagation, importation, and exportation of those species. The department also responds that a change was made to the proposed rule to allow the importation, sale, and subsequent exportation of indigenous species provided all such activities involve animals that were lawfully collected or propagated in another state and all such activities are reported to the department.

The commenter stated that a ban on the sale of turtles would create a black market and lead to poaching. The department disagrees with the comment and responds that persons who violate the law, run the risk of being detected, cited, prosecuted, and convicted. No changes were made as a result of the comment.

The commenter stated that species identification difficulties would make the rules unenforceable. Although some species may have similar characteristics, the department disagrees with the comment and responds that there are enough differences to enable accurate species identification by the regulated community and department personnel. No changes were made as a result of the comment.

The commenter stated that the proposed prohibition of turtle collection would negatively affect private landowners, who do not want turtles on their property because turtles compete with desired game fish. The department responds that turtles are a natural part of freshwater ecosystems and occupy a niche in all such ecosystems. The department is unaware of any scientific research indicating that turtles harm fish populations. Nonetheless, the department notes that the rules as adopted do not prevent any private landowner from engaging in the commercial collection of red-eared slider, common snapping turtles, and soft shell turtles from private property, or from employing lethal control of turtle populations if they so choose.

The commenter stated that the rules as proposed would prohibit commercial turtle-farming and would therefore focus collection pressure on wild populations. The department disagrees with the comment and responds that a prohibition on commercial collection activities would be beneficial for turtle populations; nevertheless, the rules as adopted allow the commercial harvest of three species of turtles that are popular in the food and pet markets. The remaining species of turtles will be unlawful to collect for commercial purposes. The department is considering proposing additional regulations in the future to provide for regu-

lated captive-breeding of all nongame species. In the meantime it is necessary to prohibit the commercial collection of all turtles on public lands and waters and all species of turtles other than red-eared sliders, common snapping turtles, and softshell turtles on private lands and waters in order to manage those species. If unscrupulous persons attempt to collect turtles (on private property) in violation of the rules, the department intends to detect, cite, prosecute, and convict those persons.

The commenter stated that many private landowners have allowed turtles to propagate in private ponds, essentially creating a turtle farm, and that since the proposed rules would make possession of those turtles illegal, forcing the landowner to kill all the turtles in order to avoid a violation. The department disagrees with the comment and responds that possession is understood by the department to mean actual care, custody, or control, and that turtles, as wildlife, are not understood to be in a person's possession unless that person has trapped them. Therefore, the existence of turtles in a pond does not constitute possession for the purposes of the rule. The department also notes that the rules as adopted allow for the commercial harvest of three species of turtles that are common in commercial trade. No changes were made as a result of the comment.

The commenter stated that the proposed rules make no distinction between turtles collected for the food trade and turtles collected for the pet trade. The commenter stated that collection for the pet trade is concentrated on small juveniles, rather than the large juveniles and adults and that the removal of adults exerts the most deleterious effects on population dynamics. The department disagrees with the comment and responds that unregulated commercial collection from the wild for any purpose is unsustainable. While the pet trade may have a different impact on wild populations and ecosystems than collection for the food trade, the increased regulation of wild harvest by other states and countries has the effect of focusing such collections in those places where commercial collection is unregulated. No changes were made as a result of the comment.

The commenter stated that the department's citation of United States Fish and Wildlife Service (USFWS) export data is unreliable, because the export data does not identify the origin of turtles exported from ports of entry and includes turtles being transshipped from other states through Texas. The commenter stated that the department has not looked at the data exclusively within its control. The department disagrees with the comment and responds that while USFWS export data does not specifically identify the origin of turtles being exported, it does indicate the magnitude of commercial activity involving turtles. This supports one of the department's justifications for the rules: unregulated commercial harvest of wild populations is unsustainable and a threat to native populations and ecosystems. The department is not aware of any scientific publications indicating that unregulated commercial exploitation of wildlife resources is beneficial to nongame wildlife. The department also responds that all reported data from nongame dealers has been reviewed and used to inform and guide the rulemaking process. No changes were made as a result of the comment.

The commenter stated that the department's analysis of impacts of the proposed rules on pet dealers were inaccurate in assessing the re-export business (the importation of turtles from outside of Texas and subsequent export to points outside of Texas). The commenter stated that one pet dealer re-exported approximately 92,500 non-native turtles in 2006, and that under the rules as proposed, that pet dealer stood to lose approximately $250,000. The department disagrees with the comment and responds that the rules apply only to species indigenous to Texas, not to non-native species. Therefore, the pet dealer in question would not be affected. The department also notes that the rules as adopted would allow the importation and subsequent exportation of species indigenous to Texas, provided the importer reports each instance of importation and can document that the turtles were lawfully collected or propagated in another state. No changes were made as a result of the comment.

The commenter stated that the department's survey data is inadequate in assessing the economic impact of the proposed rules on commercial nongame dealers. The department disagrees with the comment and responds that the survey data is the best data available to the department. The department sent a survey to every nongame permit and commercial nongame permit holder in the state. The survey asked each respondent to report the dollar value of commercial activity for each of over 100 nongame species. The survey was not compulsory, and not all permittees responded. The department used those data that were supplied and did not speculate beyond those data. No changes were made as a result of the comment.

The commenter stated that the department's comparison of the proposed rules' economic impacts to small and large businesses was incorrect. The commenter stated that pet dealers who are unable to supply turtles would likely lose their non-turtle business as well because pet stores generally purchase all stock from one source. The commenter stated that a large commercial pet dealer in Texas would be forced to relocate outside of the state in order to remain in business because the rules would not allow re-export. The commenter did not identify the pet dealer in question or provide financial or economic data to support the comment. The department responds that a change was made to the proposed rules to allow the import of all species, provided that any importation of indigenous nongame species is reported and accompanied by documentation that the nongame wildlife was legally collected or propagated in another state. Also, as required by Government Code, Chapter 2006, the department analyzed the impacts of proposed rules on microbusinesses and small businesses required to comply with the rule and determined that the rule exerted an equal effect on the smallest business affected by the rule and the largest [small] business affected by the rule.

The commenter proposed alternative rules. The department responds to each of the commenter's suggested provisions in the following.

The current rules allow the department to refuse permit issuance to any person who has been finally convicted of a violation of the Parks and Wildlife Code within five years of applying for a nongame permit. The commenter stated that this provision should be replaced with a provision that makes such decisions "discretionary if there has been a substantial and knowing violation of the reporting requirements." Although the rulemaking as proposed did not contemplate administrative provisions such as permit refusal, the department nonetheless disagrees with the comment and responds that the purpose of the rule in question is to make it clear that reporting is important, as it is critical to the department's efforts to monitor commercial activities involving nongame wildlife. The department also notes that provisions of the Penal Code relating to culpability provide that the intentional, knowing, reckless, or negligent commission of an unlawful act is a sufficient basis for prosecution. No changes were made as a result of the comment.

The commenter recommended that the rules provide for a full contested case hearing for permit denials or revocations. The department disagrees with the comment. Denial of permits under this subchapter does not, under the Parks and Wildlife Code and the Government Code, entitle the applicant to a contested case hearing. Permit revocation, however, does warrant a contested case hearing under existing law. The department declines to extend the contested case hearing right to the grant of permits governed by this subchapter, in light of the number of permits that will likely be applied for. Instead, the department intends to treat these permits on an equal footing with hunting and fishing licenses and most of the other permits that the department issues, and for which a contested case hearing is not available in the event of denial, and no changes were made as a result of the comment.

The commenter recommended that all permittees (i.e., nongame permit holders, as well as nongame dealers) be required to file collection reports, stating that such a provision would allow the department to gain a clearer picture of impacts to wild populations from nongame collections. The department disagrees with the comment. The administration of such a provision is not possible under current fiscal constraints. The current system (which requires nongame permittees to maintain a collection log during all collection activities, and nongame dealers to record that collection information for subsequent reporting to the department) is sufficient to determine what is being collected from the wild and where. The department also notes that the current rules are not intended to provide population indices, but to indicate the magnitude of commercial activity. No changes were made as a result of the comment.

The commenter offered a much larger list of nongame species to replace the current "white list," stating that in this way the department would be able to obtain more information about nongame collection efforts than it would by simply making those species unlawful to collect. The department disagrees with the comment and responds that under the rule as adopted, collection data on many species is unnecessary, since commercial collection will be unlawful. No changes were made as a result of the comment.

The commenter also suggested altering the current provisions governing violations and penalties to allow for prosecution only when the rules are "knowingly and substantially violated." The commenter stated that the current provisions have exerted a chilling effect on reporting by permittees. The proposal as published on April 20, 2007, in the *Texas Register* proposed amendments to §§65.325, 65.327, and 65.331. The provision addressed by the commenter is contained in §65.322 which is not within the scope of this rulemaking. Although the proposed rules did not contemplate provisions governing violations and penalties, the department as a matter of course carefully weighs all information before seeking to file criminal charges. The current provision for violations and penalties simply states that it is an offense to violate a provision of the subchapter. Penalties for violation of rules regarding nongame species are governed by Texas Parks and Wildlife Code, §67.005. The department has no authority to alter the penalties in a rulemaking. In addition, the department believes that violations of this subchapter should be treated the same as violations of other subchapters of department regulations, not evaluated under a different and more lenient standard. Under the Texas Penal Code, §6.02, a person is culpable if that person "intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires." No changes were made as a result of the comment.

Comment 2.

The commenter stated that Parks and Wildlife Code, §67.004(b), requires that regulations state the name of the species or subspecies, by common and scientific name, that the department determines to be in need of management. Although the department disagrees that a complete list of regulated species is statutorily required, the department has made the requested change. Providing a complete list of both "white list" species and species not legal for commercial collection is expected to facilitate enforcement and increase clarity.

The commenter stated that the department did not make a specific determination for each species, as required by statute. The department disagrees that a specific determination for each species is required by statute. However, for the species on the "white list" the department has determined, through consultation with various segments of the regulated community, that commercial harvest is sustainable for the time being. For the species not on the "white list," the department has determined that the most effective management for the time being is to prohibit not the collection and possession, but the purchase and sale, of those public resources. No changes were made as a result of the comment.

Comment 3.

The commenter stated that the facts do not support an immediate, emergency prohibition on the harvest of turtles. The department agrees that an emergency rulemaking as contemplated by the Administrative Procedure Act (Tex. Gov't Code §2001.034) or the Texas Parks and Wildlife Code (Tex. Parks & Wild. Code §12.027) was not warranted. However, the department believes that prompt action is necessary. Numerous scientific investigations, as well as the professional opinion of the scientific community, point to a positive correlation between commercial turtle harvest and eventual population declines. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that the department's proposed rules "are a massive overreaction with significant and widespread negative connotations." The department disagrees with the comment and responds that rules as proposed were intended to execute the agency's duty to protect indigenous nongame wildlife; the department believes that the protection of certain species from commercial collection is a suitable method for accomplishing that goal. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that harvest of turtles in Texas is "nowhere near a level that could result in non-sustainability." The department disagrees with the comment and responds that there is no scientific information the department is aware of that would sustain the accuracy of the commenter's assertion; however, scientific opinion is in agreement that commercial collection in general, and unregulated commercial collection in particular, are unsustainable. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that the proposed rules were not "fair or equitable in terms of the impact they would have on private lakes, ponds, and stock tanks with respect to economic community development." The commenter further stated that the department should "let the free market economy set the parameters automatically within wholly owned private properties and the commercial aspect of harvesting turtles do a free enterprise service for landowners who wish to make decisions about what can live in private waters." The department disagrees with the comment and responds that under Parks and Wildlife Code, Chapter 67, the commission is authorized to regulate the possession, sale, import, and export of nongame wildlife throughout Texas. Scientific evidence indicates that the unregulated harvest of wildlife for commercial purposes is not beneficial or sustainable. In proposing the rule amendments, the department considered the potential impact of the proposed rules on small and micro businesses as mandated by Government Code, Chapter 2006 and the fiscal implications to state and local governments. However, the department did make a change to the proposed rule to allow the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that there are millions of acres of private water that can support a fully sustainable turtle population. The department responds that the presence of turtles in some areas should not be taken as evidence that populations in those areas are necessarily viable. Long lifespans, long generation times, and relatively slow growth may give the appearance that populations are stable, even after recruitment has ceased or populations reach levels below which recovery is possible. Impacts to turtle populations, such as the loss of important nesting areas or unsustainable mortality of adults, may remain undetectable until populations reach critical levels or become extirpated. The department believes that viable and sustainable turtle populations are an important part of healthy freshwater ecosystems. Simply having large numbers of turtles in private water bodies does not equate to healthy riverine or riparian ecosystems. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that turtles "are a renewable resource that can be wisely managed by the demand-supply market while making an unutilized contribution to the economy at a time when every resource must be fully explored and harnessed for the reality of global competition." The department disagrees with the comment and responds that the supply/demand relationship that allows unregulated harvest has been proven to be a poor mechanism for wildlife management. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that the department should try some common sense and put biology and science aside. The department disagrees with the comment. The department's obligations regarding the management of nongame species in Park and Wildlife Code, Chapter 67, include scientific investigations and research. No changes were made as a result of the comment.

The commenter stated that turtles were a threat to bass and bird populations, especially on small ponds and lakes where turtle population densities are quite high. The department disagrees with the comment with regard to naturally occurring populations and responds that the department is unaware of scientific evidence indicating that turtles are a threat to the health of naturally occurring bird or fish populations. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that the USFWS data regarding turtles exported from Texas is misleading because it does not differentiate farm-raised or imported turtles from wild-caught turtles. The department disagrees with the comment and responds that the department interprets the USFWS data as a broad indicator of commercial activity, not as a precise index of collection effort on native populations. No changes were made as a result of the comment.

The commenter stated that the department should establish meaningful sampling study designs and intensive field studies on public and private waters. The department agrees with the comment and responds that it intends to initiate an intensive program of turtle research. No changes were made as a result of the comment.

The commenter stated that the population of turtles vastly outnumbers the populations of other species of wildlife and is sustainable as an inherent result of the vastness of public waters alone. The commenter also stated that no landowners engage in the stocking of turtles, yet turtles arrive and thrive in private water. The department disagrees with the comment if the comment is to be understood as an argument that activities on private property have no biological impacts on turtles. Because of the long period of time turtles take to reach reproductive age, turtles are not able to repopulate rapidly. What might seem to be an abundant population to the casual observer is under constant stress from natural factors such as high predation and low survivability of young. If commercial collection pressure is added, population crashes will occur because the mature individuals most valued by the market will be removed. The movement of turtles from naturally occurring freshwater ecosystems to artificial impoundments is therefore not an indicator of the health of turtle populations generally, but evidence that artificial impoundments are attractive to turtles. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that the harvest of deer, quail, and turkey exceeds the harvest of turtles, yet turtles are far more numerous than deer, quail, or turkey. The department agrees that the harvest of deer, quail and turkey likely exceed the harvest of turtles. However, unlike deer, quail, or turkeys, which reach reproductive maturity within a year or two of birth, turtles take much longer (8-15 years for females, depending on the species). For this reason, turtle populations are unable to sustain the high harvest rates typical of most game species without losing recuperative potential. No changes were made as a result of the comment.

The commenter stated that the department's claims of a looming demise of turtle populations is not based in fact, and that continued commercial harvest in concert with research can go hand in hand without confounding either effort. The department disagrees that unregulated commercial harvest is sustainable, but agrees that limited harvest on private property is sustainable in the short term while the department conducts additional research. The rule as adopted allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that the proposed rules take control away from landowners and cause anxiety about further government regulation. The commenter went on to state that landowners "should have the single largest statement in the debate because the rules will affect them more than anyone else, compared against the alternative of waste." The department disagrees with the comment and responds that under Parks and Wildlife Code, §1.011, all wild animals in the state, including turtles, are the property of the people of the state. Also, under Parks and Wildlife Code, Chapter 67, the department is given regulatory authority for nongame wildlife on both public and private property. The rule as adopted allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that the department's regulations on furbearing animals and saltwater fish species are focused on assuring a balance between commercial factors and ecological considerations such as sustainability, but the department is not employing such an approach with respect to turtles. The department disagrees with the comment. Turtle species have unique characteristics (such as reproductive age and mortality), and protecting them requires regulation that addresses these characteristics. Regulation of furbearing animals and saltwater fish species is based on the unique characteristics of those species. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter questioned that the proposed "white list" of species prohibited from use in commercial activity was "developed on the basis of sound studies and irrefutable data to determine if those species were plentiful, or problems, or less desirable." The department responds that the rules as proposed were developed after consultation with many collectors, dealers, academics, and members of the scientific community to determine which species are popular in commercial trade and the impacts to those species that would result or be likely to result from continued commercial collection. As a result, the department placed many of those species on the "white list" of lawful species after determining that continued commercial collection posed no immediate threat to populations or ecosystems. The rules as proposed and adopted allow for personal, noncommercial collection. The species not on the "white list" are either known or suspected to be susceptible to threats from overcollection or are not known to be subject to commercial trade. The department has determined that all such species are in need of management, and to that end, prohibiting commercial trade is a management strategy that is biologically effective as a manner of ensuring the continued ability of such species to perpetuate. No changes were made as a result of the comment.

The commenter stated that the proposed rules should be tabled pending a complete and thorough study. The department disagrees with the comment and responds that the department is satisfied that the rules as adopted are effective and scientifically defensible, but nonetheless a research program is being initiated. The scientific studies considered by the department in connection with these rules are listed elsewhere herein. No changes were made as a result of the comment.

The commenter stated that the department did not give adequate notice of the proposed rulemaking to landowners. The commenter went on to state that he was not contacted about the proposed rules and did not know about them until the day before the April 2007 meeting of the Parks and Wildlife Commission. Also, the commenter stated that landowners, fishermen, other sportsmen, and many others were not consulted. The commenter stated that "most landowners have not heard about the proposed regulations because they spend their days in applied hard work concentrating on their lands for survival and earnings, and that the department should talk to more landowners before making any decisions." The department disagrees with the comment and responds that the rules as proposed were developed after consultation with many collectors, dealers, academics, and members of the scientific community to determine which species are popular in commercial trade and the impacts to those species that would result or be likely to result from continued commercial collection. In addition, the department complied with state law governing required notice of rulemaking, including publication of the proposed rules in the *Texas Register* at least 30 days prior to commission action. In addition, above and beyond the minimum notice required by law to be published in the *Texas Register,* the proposed rules were published on the department's website for at least 30 days prior to commission action, and were sent to each member of the regulated community (persons who hold either a nongame or commercial nongame dealer permit). The department also hosted several meetings around the state to confer with the regulated community and issued press releases to over 200 newspapers. Therefore, the department responds that every reasonable effort was made to inform the public, including landowners, about the proposed rulemaking. No changes were made as a result of the comment.

The commenter stated that it would be a waste of a valuable renewable resource to prohibit the commercial use of turtles taken from private waters, leaving people with only the option of shooting and leaving them. The department disagrees with the comment, and responds that commercial exploitation of wildlife resources has historically resulted in negative impacts to wildlife populations and ecosystems; therefore, the elimination of commercial exploitation is beneficial to these resources. The department also notes that nothing in the rules as proposed or adopted prohibited the personal use of harvested turtles, which means there is an alternative to waste, albeit a non-commercial alternative. The department also responds that the rules as adopted allow for the commercial harvest of three species of turtles on private lands and waters.

The commenter stated that there are millions of acres of public water to serve as a nursery or buffer zone to make sure that turtle populations are healthy. The department disagrees with the comment if it is intended to mean that unregulated commercial collection of turtles on private land and water should be allowed. The rules as adopted, however, prohibit the commercial collection of turtles on public land and water, and allow for the commercial harvest of three species of turtles on private lands and waters.

The commenter stated that the proposed rules were an instant and overnight alarmist approach using facts that were not based in reality to justify an emergency prohibition on the collection of turtles. The department disagrees with the comment and responds that the rules were not proposed or adopted on an emergency basis. There has been longstanding concern in the scientific community about declining turtle populations worldwide. The department has reviewed the available data, including data reported to the department and the U.S. Fish and Wildlife Service, and has determined that increasing demand for turtles by the international food market puts wild populations of turtles in Texas at risk if commercial take is not regulated. The rule as adopted, however, allows the commercial collection of red-eared

slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that turtle populations are not in danger from unregulated commercial harvest and that such harvest effort is not anything close to being non-sustainable. The department disagrees with the comment and responds that scientific publications indicated that unregulated and illegal commercial collection activities are directly related to turtle population declines in Asia and elsewhere. The department is unaware of any scientific publication suggesting that unregulated commercial harvest is sustainable. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that "the department wanted to prohibit commercial harvest of turtles based on not having enough data, but then included red-eared sliders on the 'white list' because they are so numerous." The department disagrees with the comment and responds that testimony provided by acknowledged scientific experts on turtle biology averred that red-eared sliders are more common and could withstand current levels of commercial harvest in the short term. The rule as adopted, accordingly, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

The commenter stated that rattlesnake roundups are not going to be regulated, even though collection efforts are as or more intensive than turtle collection efforts. The department disagrees with the commenter and responds that scientific studies have shown that diamondback rattlesnake populations (the species overwhelmingly collected for rattlesnake roundups) are able at present to withstand intensive collection efforts. No changes were made as a result of the comment.

Miscellaneous Comments

For ease of reading, the following comments were generally organized by the subject of the comment.

Pets and Captive Breeding

One commenter opposed adoption and stated that outlawing turtles as pets was totalitarianism. The department disagrees that the rules as proposed or adopted contemplated a prohibition on the take or possession of turtles as pets, and responds that the rules were proposed and adopted in accordance with state law by a duly constituted governmental entity. No changes were made as a result of the comment.

One commenter opposed adoption and stated that it is preposterous to make it illegal to trade in or possess turtles, because there are many available captive-bred turtles available and it enriches the lives of those who care for them. The department agrees with the commenter that are many captive-bred turtles and that they are traditionally kept as pets. In attempting to conserve turtle populations, the department has found it necessary to prohibit their collection from the wild for commercial use. The rules as proposed and adopted do not prohibit collection for personal use, including as pets. In addition, the department notes that it is considering proposing additional regulations in the future to address captive breeding and the sale of captive-bred animals. No changes were made as a result of the comment. Eleven commenters opposed adoption and stated that hobbyists and/or pet owners should be able to keep, breed, sell or give away captive-bred offspring, and that there should be no possession limit for captive-bred animals. The commenters also stated that captive breeding removes collection pressure on wild populations. The department agrees in part with the comments and notes that the rules as adopted provide for the "grandfathering" of private collections; however, some aspects of the captive-breeding issue (such as the creation of a captive-breeding permit) are beyond the scope of this rulemaking. The department intends to address captive breeding in a future rulemaking. No changes were made as a result of the comments.

One commenter opposed adoption and stated there should be a captive-breeding permit for diamondback terrapin. The department disagrees with the comment and responds that possession and sale of diamondback terrapin is prohibited under other regulations and is not addressed by this rulemaking. No changes were made as a result of the comment.

Economic Impacts

One commenter opposed adoption and stated that a prohibition on commercial harvest of turtles would take away a source of income for hundreds of Texans, some of whom who do it as a sole source of income. The department disagrees with the comment and responds that although there historically have been no restrictions on commercial activities involving nongame wildlife, the department cannot use that fact as a justification for failing to fulfill the department's statutory obligation to protect, manage, and conserve nongame wildlife. The department has determined that unregulated commercial harvest of turtles is unsustainable. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

One commenter opposed adoption and stated that individuals are trying to earn a living and feed their families while contributing to scientific knowledge and the "white list" will put them out of business. The department disagrees with the comment and responds that a business model directly dependent on the perpetual, unregulated exploitation of a public resource should not take precedence over the regulatory duty of the department. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

One commenter opposed adoption and stated that commercial harvest of turtles is good for low-income people. The department disagrees and responds that the statutory authority of the department is the conservation of wildlife resources. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

Four commenters opposed adoption and stated that it would be a waste of a valuable renewable resource to prevent the commercial use of turtles taken from private waters by allowing people to just shoot and leave them. The department responds that commercial exploitation of wildlife resources has historically resulted in negative impacts to wildlife populations and ecosystems; therefore, the elimination of commercial exploitation is beneficial to those resources. The department also notes that nothing in the rules as proposed or adopted prohibited the personal use of harvested turtles, which means there is an alternative to waste, albeit a non-commercial alternative. The department also responds that the rules as adopted allow for the commercial harvest of three species of turtles on private lands and waters.

Two commenters opposed adoption and stated that turtle harvesting should be managed and enforced rather than banned.

The commenter stated that the department could limit the commercial harvest for commercial turtle trappers by various methods. The department agrees that turtle populations can potentially be managed by the application of adaptive methodologies such as seasons, bag and possession limits, and gear restrictions; however, the department lacks the discrete population data at local resolution necessary to manage individual species, watersheds, and stream segments. The rules as adopted are intended to prevent an immediate threat to turtle populations and freshwater ecosystems throughout the state. The department is embarking on a research program that will yield useful data in determining if adaptive management strategies can be implemented. The rule as adopted allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

One commenter opposed adoption and stated that a prohibition on commercial turtle harvesting would remove an important enterprise from the state's economy. The department disagrees with the comment and responds that commercial turtle sales are not a statistically significant component of the state's economy. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

One commenter opposed adoption and stated that the rules violated the principles of free enterprise. The department disagrees with the comment and responds that the rules are intended to protect a public resource, not to regulate commerce. To the extent that the rules affect a business activity, the department responds that a business model directly dependent on the perpetual, unregulated exploitation of a public resource is inherently unstable. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules as proposed would affect too many businesses. The department disagrees with the comment. The department analyzed the economic effects of the rule and has determined that the rule will result in the best combination of effectiveness in obtaining the desired results and of economic costs not materially greater than the costs of any alternative regulatory method considered. The rule as adopted lessens the effect on businesses in comparison to the rule proposal, inasmuch as the adopted rule allows continued collection of three common species of turtles on private land and water.

Science

Three commenters opposed adoption and stated that more research should be done before prohibiting the commercial harvest of turtles on private lands. The department agrees with the comment as regards three species of turtles and has made changes accordingly. The department disagrees with the comment as regards other turtle species on the basis that these other turtle species cannot withstand unrestricted commercial collection, and turtles are an important part of healthy freshwater ecosystems.

One commenter opposed adoption and stated that turtle harvesters observe turtle populations every day, but the state does not have anyone doing it. The commenter stated that the department should do research before taking radical action. The department disagrees with the commenter and responds that the consensus of the scientific community is that unrestricted commercial collection of turtles, wherever it occurs, leads to population declines. Anecdotal evidence, no matter how accurate it is, is not scientifically valid. The department also notes that it is initiating an intensive program of turtle research. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

Two commenters opposed adoption and stated that there are more than enough turtles in fresh water to last forever. The department disagrees with the comment and responds that no wildlife resource is inexhaustible. In addition, because of turtles' delayed sexual maturity, long lifespans, and low reproductive and survival rates, perceived current abundance, relative or absolute, of turtle species, is not necessarily indicative of the overall health of the population. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should hear from turtle professionals before making rules. The department agrees with the commenter and responds that the department consulted with numerous acknowledged professional experts regarding turtles. No changes were made as a result of the comment.

One commenter opposed adoption and stated that development and habitat destruction are far more culpable for turtle population declines than commercial collection activities. The department agrees that development and habitat destruction can contribute to the decline of turtle populations. However, all factors limiting turtle populations are additive and unregulated commercial collection is believed to be a significant factor. The department has the statutory authority to regulate the possession and sale of turtles. The rules as adopted prohibit commercial harvest of all turtles from public lands and waters and all but three species from private lands and waters. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the proposed rules are overly broad with respect to turtles and that the data used to support the proposed rules is inconclusive. The commenter stated that the proposed rules need to be modified to allow limited collection while more reliable data is generated to support a broader prohibition. The department responds that there is widespread agreement among the scientific community that unregulated commercial collection of turtles has led to the extirpation of turtle populations wherever it has been allowed to occur. The department agrees that additional research is needed if adaptive management strategies are to be employed in the future, and is embarking upon a research program designed to generate such data. The rule as adopted, moreover, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters, and reporting of information regarding commercial collection.

One commenter opposed adoption and stated that the "white list" will restrict scientific research in those species not listed, since researchers will not have the means to go into the field and collect all the species or tissue samples they may need for research and most of them rely on companies and individuals in the area of the species occurrence to go out and collect these species. The department disagrees with the comment and responds that legitimate scientific, educational, or zoological collection can be done under other permits issued by the department, and may be performed by subpermittees under the direction of permittees. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rules did not address the collection of data for the export of nongame wildlife. The department disagrees with the comment and re-

sponds that the department captures the data on commercial collection and sale from the annual reports of the nongame dealers. No changes were made as a result of the comment.

Private Landowner Impacts

Eight commenters opposed adoption and stated that private landowners should be able to harvest and sell turtles caught in their private waters as they please. The department disagrees with the comments and responds that although the rules as adopted will allow for the commercial harvest and sale of three species of turtles from private lands and waters, under Parks and Wildlife Code, §1.011, all wild animals in the state, including turtles, are the property of the people of the state. Under Parks and Wildlife Code, Chapter 67, the department is required to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale of offering for sale of nongame wildlife. The department therefore asserts that any activities involving nongame wildlife must be consistent with department regulations governing nongame wildlife.

One commenter opposed adoption and stated that the turtles caught from private waters are only a small percent of the total numbers and that the impact of collection on private waters is slight. The commenter also stated that private landowners wouldn't want to eradicate turtle populations, because then there would be no source of income. The department disagrees with the commenter and responds that commercial collection of nongame species has resulted in depletion and extinction. The department will continue to study the impact of commercial collection in private waters on turtle populations, and the rule as adopted allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

Three commenters opposed adoption and stated that it is a basic property right of landowners to control turtle populations. The department disagrees with the commenters and responds that under Parks and Wildlife Code, §1.011, all wild animals, including turtles, are the property of the people of the state; therefore, there is no right in property for an individual landowner with respect to turtles. No changes were made as a result of the comment.

One commenter opposed adoption and stated that commercial harvest of turtles on private water allows landowners to recover costs that go into lake management and restocking. The department disagrees with the comment and responds that neither the current rules nor the rules as proposed or adopted rules are intended to address cost reduction factors associated with pond management on private property; however, the rules as adopted allow for the commercial harvest of three species of turtle on private land and waters.

One commenter opposed adoption and stated that the proposed rules were a great injustice to private landowners and pet collectors everywhere, not just in Texas. The department disagrees with the comment and responds that the rules as adopted were promulgated in accordance with applicable laws governing state agency rulemaking and that the department has acted within the scope of statutory authority in performing its statutory duty to managed nongame wildlife. Therefore, the rules as adopted are not an injustice. No changes were made as a result of the comment.

Predation by Turtles

Three commenters opposed adoption and stated that turtles were a threat to bass and bird populations, and that every means to eliminate turtles should be encouraged. The department disagrees with the comment and responds that there is no scientific evidence that the department is aware of indicating that turtles are a threat to the health of bird or fish populations, and that turtles are an inherent component of healthy freshwater ecosystems. The department is charged by statute with managing and protecting nongame wildlife; therefore, the elimination of turtles would be antithetical to the department's statutory duty. No changes were made as a result of the comment.

One commenter opposed adoption and stated that he has spent thousands of dollars stocking fish in his ponds with fish and is losing fish to turtles. The department disagrees with the comment and responds that there is no scientific evidence that the department is aware of indicating that turtles are a threat to the health of naturally occurring fish populations. Artificial environments such as small lakes and stock tanks are attractive to turtles, and if those impoundments are stocked with high densities of fish, some predation could occur. Therefore, such environments should be fenced or otherwise constructed so as to exclude turtles. No changes were made as a result of the comment.

Five commenters opposed adoption and stated that turtles are nuisances or pests that do significant damage to fish populations. The department disagrees with the comment and responds that there is no scientific evidence that the department is aware of indicating that turtles are a threat to the health of naturally occurring fish populations. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the rules would cause turtle populations to explode, jeopardizing fish-farming operations in the state. The department disagrees with the comment and responds that there have been no comments received from aquaculturists concerning the proposed rules, and that nothing in the rules as adopted would prevent an aquaculturist from employing lethal control. No changes were made as a result of the comment.

Species Management

Two commenters opposed adoption and stated that no species of rattlesnake should be on the "white list." The department disagrees with the comment and responds that studies have shown that the most heavily harvested rattlesnake populations are not at present adversely impacted by collection efforts. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the rules do not eliminate possession limits, as stated, because rattlesnake collectors would be allowed to possess more than 25 snakes. The department disagrees with the comment and responds that the possession limits are used to determine when a commercial nongame dealer permit must be acquired and possessed, and that most rattlesnake species may be lawfully collected for commercial uses. No changes were made as a result of the comment.

One commenter opposed adoption and stated that black-tailed prairie dogs should not be on the "white list." The department disagrees with the comment and responds that where they occur, prairie dog populations are robust and able to withstand collection activities. No changes were made as a result of the comment.

One commenter opposed adoption and stated that a ban on commercial harvest of turtles is ridiculous and would lead to a black market. The department disagrees with the comment and responds that there will always be people who make the conscious decision to violate the law, and that those who do run the risk of being detected, cited, prosecuted, and convicted. The rule as adopted, however, allows the commercial collection of red-eared slider, common snapping turtle, and softshell turtles from private land and waters.

Two commenters opposed adoption and stated that commercial collection of any species of nongame should be prohibited. The department disagrees with the comment and responds that in consultation with herpetologists, hobbyists, and others familiar with the popularity of various nongame species in commercial trade, the department determined that there are approximately 80 species in the state that can withstand commercial collection pressure at current levels. Since the intent of the proposed rules is to provide a mechanism to monitor commercial activities involving these species, the department is confident that it will be able to intercede if commercial activity threatens a population. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the only species on the "white list" should be non-native injurious species and 'safe' non-natives such as anoles and English sparrows. The department disagrees with the comment and responds that the department's regulatory authority is restricted to indigenous species only, and that the rules as adopted do not apply to birds. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that harvest of wild turtles for any purpose should be prohibited. The department disagrees with the comment and responds that the capture of turtles for personal use is not believed to occur on a scale that is biologically significant. The department also has consulted with acknowledged experts on turtles and determined that three species (red-eared slider, common snapping turtle, and softshell turtles) can withstand current levels of commercial collection in the short term if the collection efforts are restricted to private property. No changes were made as a result of the comments.

One commenter opposed adoption and stated that since the "white list" protects species that are not in demand but allows commercial harvest in species that are in demand, it is counter to conservation. The commenter stated that the "white list" goes against the department's mission statement, because it will ban commercial activity in a large number of species, thus taking away opportunities for the use and enjoyment of present and future generations. The department disagrees with the comment. The department placed many of those species on the "white list" of lawful species after determining that continued commercial collection posed no immediate threat to populations or ecosystems. The species that were not placed on the "white list" are not unlawful to collect or possess, but are unlawful to collect or possess for commercial purposes. The rules as proposed and adopted allow for personal, noncommercial collection. The species that are not on the "white list" are either known or suspected to be susceptible to threats from overcollection or are not known to be subject to commercial trade. The department believes that all such species are in need of management, and to that end, prohibiting commercial trade is a management strategy that is biologically effective as a manner of ensuring the continued ability of such species to perpetuate themselves and affects no economic interest, since to the department's knowledge there is little or no commercial activity involving the unlisted species. No changes were made as a result of the comment.

One commenter opposed adoption and stated that development, roads, human population growth and the policies of "economic growth" threaten the continued existence of almost all species. The commenter stated that a captive population of live amphibians and reptiles is a "safety net" against uncontrolled growth. The department disagrees with the comment and responds that all factors limiting turtle populations are additive. The department does not have the statutory authority to regulate development activities or land use, but does possess the statutory authority to regulate the possession and sale of turtles. The rules as adopted prohibit commercial harvest of all turtles from public lands and waters and all but three species from private lands and waters. The department considers that taking this action will protect turtle populations more effectively than not taking this action. The department also responds that the use of private collections for repopulation is a highly problematic, last-resort scenario, assuming the existence and availability of suitable habitat, the health of the host ecosystem, and the genetic diversity and health of reintroduced stock. No changes were made as a result of the comment.

Public Notice

Four commenters opposed adoption and stated that they were not informed of the proposed rules until shortly before the meeting of the Parks and Wildlife Commission. The department disagrees with the comments and responds that the rules were published in the *Texas Register* (as required by state law), were published on the department's website for at least 30 days prior to any commission action, and were personally sent to each member of the regulated community (persons who hold either a nongame or commercial nongame dealer permit). In addition, the department hosted several meetings around the state to confer with the regulated community and issued press releases to over 200 newspapers. Therefore, the department responds that extensive efforts were made to inform the public about the proposed rulemaking, above and beyond the minimum public notice requirements. No changes were made as a result of the comments.

One commenter opposed adoption and stated that the proposed rules "came through the back door" and that tax dollars should be spent better. The department disagrees with the comment and responds that the rules were published in the *Texas Register* (as required by state law), were published on the department's website for at least 30 days prior to any commission action, and were personally sent to each member of the regulated community (persons who hold either a nongame or commercial nongame dealer permit). In addition, the department hosted several meetings around the state to confer with the regulated community and issued press releases to over 200 newspapers. Therefore, the department responds that extensive efforts were made to inform the public about the proposed rulemaking, above and beyond the minimum public notice requirements. No changes were made as a result of the comment.

Other

Two commenters opposed adoption and stated that it prevents research that uses rattlesnake venom. The department disagrees with the comment and responds that the rules do not in any way impede the use of rattlesnake venom in medical research. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the proposed prohibition on commercial turtle harvesting was unconstitutional. The department disagrees with the comment and responds that the rules as adopted were validly promulgated in accordance with all state laws applicable to rulemaking by state agencies and the Texas and U.S. constitutions. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should add more rules and regulations to police the industry. The department disagrees with the comment and responds that the department believes that the rules as adopted are sufficient, for the time being. No changes were made as a result of the comment.

One commenter opposed adoption and stated that people have the right to take and possess as many nongame animals as they wish. The department disagrees with the comment and responds that under Parks and Wildlife Code, Chapter 67, the department is required to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale of offering for sale of nongame wildlife that the department considers to be necessary to manage the species. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department was trying to turn every species of animal into a game animal in order to make more money. The department disagrees with the comment and responds that nothing in the rules as proposed or adopted alters the status of any species as a game or nongame animal or any provision governing the fee for a permit or license. No changes were made as a result of the comment.

One commenter opposed adoption and stated that as an agency of the state, the department should support the will of the majority of the population of this state and the taxpayers who pay the department's salaries. The department responds that it is required to follow the rulemaking process set forth in law, and that these rules are being considered and adopted in accordance with that process. No changes were made as a result of the comment.

Two commenters opposed adoption and stated that the proposed rules are too extreme, going from no limits on commercial turtle harvest to halting it completely. The department responds that the proposed prohibition on the commercial harvest of turtles would serve the purpose the department intended, which is to protect nongame species populations and freshwater ecosystems; however, the department notes that the rule as adopted allows the commercial harvest of three species of turtles from private lands and waters.

One commenter opposed adoption and stated that the proposal was not balanced. The department disagrees and responds that rules as adopted are believed to accomplish the agency's statutory duty to protect nongame wildlife populations while preserving the public's ability to use and enjoy them. No changes were made as a result of the comment.

The amendments are adopted under the authority of Parks and Wildlife Code, §67.004, which requires the commission to establish any limits on the taking, possession, propagation, transportation, importation, exportation, sale, or offering for sale of nongame fish or wildlife that the department considers necessary to manage the species; and §67.0041, which authorizes the department to issue permits for the taking, possession, propagation, transportation, sale, importation, or exportation of a nongame species of fish or wildlife if necessary to properly manage that species.

§65.325. Applicability.

(a) General Applicability. In this subchapter, nongame wildlife means those species of vertebrate wildlife, living or dead, that are indigenous to this state and are not classified as game animals, birds, fish, furbearing animals, endangered species, alligators, marine penaeid shrimp, or oysters. Nongame wildlife includes captive-bred nongame wildlife, parts of nongame wildlife, and the eggs of nongame wildlife.

(b) Exceptions. This subchapter does not apply to the following nongame wildlife:

(1) coyotes;

(2) mountain lions;

(3) bobcats;

(4) rabbits;

(5) American bison;

(6) diamondback terrapin (Malaclemys terrapin), which are addressed under the provisions of §65.82 of this title (relating to Other Aquatic Life); or

(7) threatened species listed in Subchapter G of this chapter (relating to Threatened and Endangered Nongame Species).

(c) Transitional Provisions for Possession of Certain Nongame Wildlife.

(1) The holder of a permit issued under this subchapter who is in lawful possession of nongame wildlife prior to the effective date of this section who would be in violation of this subchapter after the effective date of this section by continuing to possess the nongame wildlife for commercial activity must sell, donate, or otherwise dispose of the nongame wildlife by May 1, 2008.

(2) A person in lawful possession of nongame wildlife prior to the effective date of this section who would be in violation after the effective date of this section and who possesses the nongame wildlife for personal, noncommercial use may continue to possess the nongame wildlife and any increase, provided:

(A) the person contacts the department by no later than November 1, 2008 and reports the person's name and address, and the species and number of the nongame wildlife in possession; and

(B) the person does not engage in any commercial activity involving the nongame wildlife possessed under this section.

§65.327. Permit Required.

(a) General Requirement. Except as provided in this subchapter, no person may collect, acquire, possess, import, export, cause the import or export of, or engage in a commercial activity involving nongame wildlife.

(b) Permit Privileges and Restrictions.

(1) The holder of a valid nongame dealer permit may:

(A) collect nongame wildlife listed in §65.331(d) of this title (relating to Commercial Activity) from the wild;

(B) sell nongame wildlife to anyone;

(C) acquire nongame wildlife by or for a commercial activity only from a person permitted under this subchapter or a lawful out-of-state source; and

(D) may import nongame wildlife into Texas for sale or resale, including for purposes of export, provided the person:

(i) does not release the nongame wildlife in Texas or allow the nongame wildlife to commingle with native nongame wildlife in Texas;

(ii) possesses an invoice, bill of sale, or receipt establishing that the nongame wildlife was lawfully obtained in and transported from another state;

(iii) completes and mails to the department a department-supplied Notice of Import/Export within 24 hours of each instance of shipping such wildlife out-of-state or receiving such nongame wildlife from out-of-state; and

(iv) maintains all documentation required by this paragraph for a period of two years following the importation of the nongame wildlife. The documentation required by this paragraph includes the dealer's copy of each Notice of Import/Export. All documentation shall be provided at the request of any department employee acting within the scope of official duties.

(2) The holder of a valid nongame permit:

(A) may collect nongame wildlife listed in §65.331(d)of this title from the wild; and

(B) may purchase or acquire nongame wildlife listed in §65.331(d)of this title from the holder of a valid nongame dealer permit or lawful out-of-state source; but

(C) may sell only to the holder of a valid nongame dealer permit.

(3) A person without a nongame or nongame dealer's permit may:

(A) possess six or fewer specimens of a species of nongame wildlife listed in §65.331(e)of this title, provided the person does not engage in commercial activity involving the nongame wildlife; and

(B) possess 25 or fewer specimens of a species of nongame wildlife listed in §65.331(d) of this title, provided the person does not engage in commercial activity involving the nongame wildlife.

(4) A permit is not required for any person to sell nongame wildlife listed in §65.331(d) of this title for and ready for immediate consumption in individual portion servings, and which are subject to limited sales or use tax, provided the person maintains a receipt identifying the source of the nongame wildlife.

(5) Notwithstanding any other requirement of this subchapter, no permit under this subchapter is required to purchase, possess, or sell processed products made from nongame wildlife.

(6) No person in this state may take nongame wildlife and subsequently treat it to create a processed product for sale, offer for sale, exchange, or barter unless that person possesses a valid nongame dealer's permit.

(c) Possession of Permit.

(1) This subchapter does not relieve any person of the obligation to possess an appropriate hunting license for any activity involving the take of nongame wildlife.

(2) Except as provided in this section, a permit required by this subchapter shall be possessed on the person of the permittee during any activity governed by this subchapter. A separate permit is required for each permanent place of business. An employee of a nongame dealer may engage in commercial activity or the resale of nongame wildlife only at a permanent place of business operated by the permittee, provided that:

(A) the employer's permit or a legible photocopy of the permit is maintained at the place of business during all activities governed by this subchapter; and

(B) the place of business has been identified on the application required by §65.329 of this title (relating to Permit Application).

(3) In the event that a nongame dealer conducts a commercial activity at a place in addition to the permittee's permanent place of business, that person shall possess on their person the original or a legible photocopy of a valid nongame dealer's permit.

(d) Period of Permit Validity. A permit issued under this subchapter is valid through the August 31 immediately following the date of issuance.

(e) Exception. No permit is required for nongame wildlife not taken or originating in Texas that are shipped by common carrier or accompanied by documentation of lawful possession from outside of this state to a destination within this state for immediate shipment outside the state.

§65.331. Commercial Activity.

(a) Policy. The department shall develop a policy for periodic evaluation of pertinent information or evidence to determine if a species should be added to or removed from the lists of species in this section.

(b) Turtles.

(1) The holder of a nongame permit may possess, transport, sell, import, or export common snapping turtle (Chelydra serpentina), red-eared slider (Trachemys scripta), or softshell turtle (Apalone spinifera, A. muticus) in accordance with the provisions of this subchapter, provided that take occurs on private land or private water.

(2) The holder of a nongame dealer's permit may possess, transport, sell, resell, import, or export common snapping turtle (Chelydra serpentina), red-eared slider (Trachemys scripta), or softshell turtle (Apalone spinifera, A. muticus) in accordance with the provisions of this subchapter, provided that take occurs on private land or private water.

(3) No person while on or in public water may possess or use a net or trap capable of catching a turtle. This section does not apply to:

(A) dip nets; or

(B) minnow traps, provided the minnow trap is less than 24 inches in length or has a throat smaller than one by three inches.

(c) It is an offense for any person to take or attempt to take nongame wildlife for purposes of commercial activity from public land or water.

(d) The species of nongame wildlife listed in this paragraph may be possessed, purchased, sold, offered for sale, imported, or exported as provided under this subchapter.
Figure: 31 TAC §65.331(d)

(e) No person shall engage in commercial activity involving any nongame species not listed in subsection (d) of this section, except as provided in §65.327(e) of this title (relating to Permit Required) and subsection (b) of this section. This prohibition on commercial activity includes, but is not limited to, the following species:
Figure: 31 TAC §65.331(e)

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 1, 2007.

TRD-200704634
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: October 21, 2007
Proposal publication date: April 20, 2007
For further information, please call: (512) 389-4775

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TITLE 37. PUBLIC SAFETY AND CORRECTIONS

PART 1. TEXAS DEPARTMENT OF PUBLIC SAFETY

CHAPTER 9. PUBLIC SAFETY COMMUNICATIONS

SUBCHAPTER D. SILVER ALERT NETWORK

37 TAC §§9.31 - 9.34

The Texas Department of Public Safety (DPS) adopts new Subchapter D, §§9.31 - 9.34, concerning the Silver Alert Network, without changes to the proposed text as published in the August 24, 2007, issue of the *Texas Register* (32 TexReg 5327).

Adoption of the new sections is necessary in order to promulgate the policies and procedures of DPS governing the statewide coordination of the Silver Alert Network. The new sections are necessary to fully implement S.B. 1315, Acts 2007, 80th Leg., R.S.

No comments were received regarding adoption of the new sections.

The new sections are adopted pursuant to Texas Government Code, §411.383(b), which requires the director to adopt rules and issue directives as necessary to ensure proper implementation of the alert system, with the rules and directives to include procedures to be used by local law enforcement; a description of the circumstances under which local law enforcement is required to report a missing senior citizen; and the procedures to be used to notify designated media outlets in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704730
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: October 28, 2007
Proposal publication date: August 24, 2007
For further information, please call: (512) 424-2135

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CHAPTER 13. CONTROLLED SUBSTANCES

SUBCHAPTER A. GENERAL PROVISIONS

37 TAC §13.1, §13.9

The Texas Department of Public Safety adopts amendments to §13.1 and §13.9, concerning General Provisions, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4190).

Adoption of the amendments to §13.1 reformats the section in order to add and delete definitions. Adoption of the amendment to §13.9 is necessary in order to correct the fax number for the Texas Prescription Program.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704732
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: October 28, 2007
Proposal publication date: July 6, 2007
For further information, please call: (512) 424-2135

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SUBCHAPTER B. REGISTRATION

37 TAC §§13.21, 13.22, 13.24 - 13.30

The Texas Department of Public Safety adopts amendments to §§13.21, 13.22, and 13.24 - 13.30, concerning Registration, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4191).

Due to legislation from the 79th Regular Legislative Session in HB 164, regarding the distribution and retail sales of certain chemical substances, Texas Health and Safety Code, §481.077 was modified and Texas Health and Safety Code, §481.0771 was created. Based on changes to the law, adoption of the amendments is necessary in order to reflect recent changes made to federal regulations and to accommodate current business processes.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER D. OFFICIAL PRESCRIPTIONS

37 TAC §§13.73, 13.78, 13.81, 13.82, 13.84

The Texas Department of Public Safety adopts amendments to §§13.73, 13.78, 13.81, 13.82 and 13.84, concerning Official Prescriptions, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4193).

Due to legislation from the 79th Regular Legislative Session in HB 164, regarding the distribution and retail sales of certain chemical substances, Texas Health and Safety Code, §481.077 was modified and Texas Health and Safety Code, §481.0771 was created. Based on changes to the law, adoption of the amendments is necessary in order to reflect recent changes made to federal regulations and to accommodate current business processes for permitting and reporting the distribution and sales of certain chemical substances.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER E. PRECURSORS AND APPARATUS

37 TAC §§13.101, 13.103, 13.104, 13.107 - 13.117

The Texas Department of Public Safety adopts amendments to §§13.101, 13.103, 13.104, 13.107 - 13.110 and new §§13.111 - 13.117, concerning Precursors and Apparatus, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4195).

Due to legislation from the 79th Regular Legislative Session in HB 164, regarding the distribution and retail sales of certain chemical substances, Texas Health and Safety Code, §481.077 was modified and Texas Health and Safety Code, §481.0771 was created. Based on changes to the law, adoption of the amendments is necessary in order to reflect recent changes made to federal regulations and to accommodate current business processes for permitting and reporting the distribution and sales of certain chemical substances.

Adoption of new §13.111 is necessary in order to identify excluded substances, while adoption of new §13.112 is necessary in order to identify new statutory requirements for the reporting of ephedrine, pseudoephedrine, and norpseudoephedrine wholesales, including a provision for the reporting of suspicious quantity orders. Adoption of new §§13.113 - 13.117 is filed simultaneously with the adoption for repeal of current §§13.112 - 13.116.

No comments were received regarding adoption of the amendments and new sections.

The amendments and new sections are adopted pursuant to Texas Health and Safety Code, §§481.003, 481.077, 481.0771, and 481.080, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704735
Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
Effective date: October 28, 2007
Proposal publication date: July 6, 2007
For further information, please call: (512) 424-2135

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37 TAC §§13.111 - 13.116

The Texas Department of Public Safety adopts the repeal of §§13.111 - 13.116, concerning Precursors and Apparatus, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4198).

Adoption of the repeals is necessary due to legislation from the 79th Legislature, Regular Session, in HB 164, regarding the distribution and retail of certain chemical substances, Texas Health and Safety Code, §481.077 was modified and Texas Health and Safety Code, §481.0771 was created. Based on changes to law, it was necessary to propose revisions and additional clarification of current rules for permitting and reporting the distribution and sales of certain chemical substances. Adoption of the repeals is filed simultaneously with the adoption of new renumbered sections.

No comments were received regarding adoption of the repeals.

The repeals are adopted pursuant to Texas Health and Safety Code, §§481.003, 481.077, and 481.0771, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 8, 2007.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER F. APPLICATION

37 TAC §§13.131 - 13.133, 13.137

The Texas Department of Public Safety adopts amendments to §§13.131 - 13.133 and 13.137, concerning Controlled Substances Application, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4198).

Due to legislation from the 79th Regular Legislative Session in HB 164, regarding the distribution and retail sales of certain chemical substances, Texas Health and Safety Code, §481.077 was modified and Texas Health and Safety Code, §481.0771 was created. Based on changes to the law, adoption of the amendments is necessary in order to reflect recent changes made to federal regulations and to accommodate current business processes for permitting and reporting the distribution and sales of certain chemical substances.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Health and Safety Code, §§481.003, 481,077, 481.0771, and 481.080, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER G. FORFEITURE AND DESTRUCTION

37 TAC §13.155, §13.158

The Texas Department of Public Safety adopts amendments to §13.155 and §13.158, concerning Forfeiture And Destruction, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4200).

Adoption of amendment to §13.155 is necessary in order to delete a reference to repealed Chapter 484, Texas Health and Safety Code. Adoption of amendment to §13.158 is necessary in order to update the state agency name.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER H. SECURITY

37 TAC §§13.184 - 13.186

The Texas Department of Public Safety adopts amendments to §§13.184 - 13.186, concerning Security, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4200).

Adoption of amendments to §13.184 and §13.186 are necessary in order to correct a grammatical error and a reference to statute. Amendments to §13.185 are necessary in order to state an additional prohibited act regarding the Official Prescription Form and specify allowable forms and criteria for faxed forms.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER I. RECORD KEEPING

37 TAC §§13.205 - 13.208

The Texas Department of Public Safety adopts amendments to §§13.205 - 13.208, concerning Record Keeping, without

changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4202).

Adoption of the amendments to the sections is necessary in order to correct grammatical errors, to improve clarity and to include additional requirements to update information.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act; and §481.080(1), which provides that a person covered by this subsection shall maintain records and inventories in accordance with rules established by the director.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER J. INVENTORY

37 TAC §13.223

The Texas Department of Public Safety adopts an amendment to §13.223, concerning Inventory, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4203).

Adoption of the amendment to §13.233 is necessary in order to correct a statutory reference.

No comments were received regarding adoption of the amendment.

The amendment is adopted pursuant to Texas Health and Safety Code, §481.003 and §481.080, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Thomas A. Davis, Jr.
Director
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For further information, please call: (512) 424-2135

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SUBCHAPTER K. INSPECTION

37 TAC §13.233, §13.237

The Texas Department of Public Safety adopts amendments to §13.233 and §13.237, concerning Inspection, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4203).

Adoption of amendments to §13.233 are necessary in order to correct a grammatical error and to improve clarity to the section. Adoption of amendments to §13.237 are necessary in order to change the name of the section and add a new subsection listing the requirements for records and reports of purchases and sales of ephedrine, pseudoephedrine, and norpseudoephedrine.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Health and Safety Code, §§481.003, 481.077, 481.0771, and 481.080, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER L. REPORTING DISCREPANCY, LOSS, THEFT, OR DIVERSION

37 TAC §13.252, §13.253

The Texas Department of Public Safety adopts amendments to §13.252, and §13.253, concerning Reporting, Discrepancy, Loss, Theft, or Diversion, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4204).

Adoption of amendments to the sections are necessary in order to correct grammatical errors and to improve clarity to the sections.

No comments were received regarding adoption of the amendments.

The amendments are adopted pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200704742

Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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For further information, please call: (512) 424-2135

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SUBCHAPTER M. DENIAL, REVOCATION, AND RELATED DISCIPLINARY ACTION

37 TAC §13.271, §13.272

The Texas Department of Public Safety adopts amendments to §13.271 and §13.272, concerning Denial, Revocation, and Related Disciplinary Action, without changes to the proposed text as published in the July 6, 2007, issue of the *Texas Register* (32 TexReg 4205).

Adoption of amendments to the sections are necessary in order to correct grammatical errors and to improve clarity to the sections.

No comments were received regarding adoption of the sections.

The amendments are adopted pursuant to Texas Health and Safety Code, §481.003, which authorizes the director to adopt rules to administer and enforce the Texas Controlled Substances Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Thomas A. Davis, Jr.
Director
Texas Department of Public Safety
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Proposal publication date: July 6, 2007
For further information, please call: (512) 424-2135

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TITLE 40. SOCIAL SERVICES AND ASSISTANCE

PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

CHAPTER 2. MENTAL RETARDATION AUTHORITY RESPONSIBILITIES

SUBCHAPTER C. CHARGES FOR COMMUNITY SERVICES

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts amendments to §§2.101 - 2.103 and 2.105 - 2.112; and the repeal of §§2.104 and 2.113 - 2.115, in Chapter 2, Mental Retardation Authority Responsibilities. The amendment to §2.105 is adopted with a change to the proposed text published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4332). The amendments to §§2.101 - 2.103 and 2.106 - 2.112, and the repeal of §§2.104 and 2.113 - 2.115, are adopted without changes to the proposed text.

The amendments and repeal are adopted to eliminate references related to mental health issues and tailor the remaining rule language exclusively to mental retardation services.

The amendments are also adopted to streamline DADS' process for updating a person's financial assessment. Instead of being required to annually update every person's financial assessment, the amendments allow a mental retardation authority to exclude certain persons whose Medicaid status indicates that they do not have an ability to pay for non-Medicaid services.

DADS received no comments regarding adoption of the amendments and repeal.

A minor editorial change was made to the text of §2.105 to clarify and improve the accuracy of the section.

40 TAC §§2.101 - 2.103, 2.105 - 2.112

The amendments are adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §534.067, which requires DADS to establish a uniform fee collection policy for mental retardation authorities.

§2.105. Accountability.

(a) Prohibition from denying services. An MRA is prohibited from denying services:

(1) to a person because of the person's inability to pay for the services;

(2) to a person in crisis, and the denial is because:

(A) a financial assessment has not been completed;

(B) financial responsibility has not been determined;

(C) the person has a past-due account; or

(D) the person had services involuntarily reduced or terminated for non-payment under §2.109(d) of this subchapter (relating to Payments, Collections, and Non-payment); or

(3) to a person pending resolution of an issue relating solely to payment for services, including failure of the person (or parent) to comply with any requirement in subsection (c), (d), (e), or (g) of this section.

(b) Identifying funding sources. An MRA must identify and access available funding sources other than DADS, and assist a person (or parent) in identifying and accessing available funding sources other than DADS, to pay for services. Available funding sources may include third-party coverage, state and/or local governmental agency funds (e.g., crime victims fund), Qualified Medicare Beneficiary (QMB) Program, or a trust that provides for the person's need for community services.

(c) Requirement for a parent to enroll a child in income-based public insurance. A parent of a child who may be eligible for Medicaid or the Children's Health Insurance Program (CHIP) must enroll the

child in Medicaid or CHIP or provide documentation that the child has been denied Medicaid or CHIP benefits or that the child's Medicaid or CHIP enrollment is pending. An MRA must provide assistance as needed to facilitate the enrollment process.

(d) Financial documentation. A person (or parent) must provide the following financial documentation:

(1) annual or monthly gross income/earnings, if any;

(2) extraordinary expenses (as defined) paid during the past 12 months or projected for the next 12 months;

(3) number of family members (as defined); and

(4) proof of any third-party coverage.

(e) Authorizing third-party coverage payment to the MRA. A person (or parent) with third-party coverage must execute an assignment of benefits authorizing third-party coverage payment to the MRA.

(f) Failure to comply.

(1) Except as provided by paragraph (2) of this subsection, if the person (or parent) fails to comply with any requirement in subsection (c), (d), (e), or (g) of this section, then the MRA must charge the person (or parent) the standard charge(s) for services. If, within 30 days after the person (or parent) initially failed to comply, the person (or parent) complies with the requirements, then the MRA must adjust the person's account to retroactively reflect compliance.

(2) The MRA may not charge the person the standard charge(s) for services if the MRA makes a decision, which is documented and includes input from the person's team, that the person's failure to comply is related to the person's functioning limitations. The decision must be reassessed at least annually. If the MRA decides that a person's failure to comply is related to the person's functioning limitations, then the MRA must develop and implement a plan to reduce or eliminate the barriers related to the person's failure to comply.

(g) Requirement for an adult person to apply for Supplemental Security Income (SSI) to become eligible for Medicaid. An adult person who may be eligible for Medicaid must apply for SSI or provide documentation that the person has been denied SSI or that the person's SSI application is pending. The MRA must provide assistance as needed to facilitate all aspects of the application process.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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Proposal publication date: July 13, 2007
For further information, please call: (512) 438-3734

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40 TAC §§2.104, 2.113 - 2.115

The repeal is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, §534.067, which requires DADS to establish a uniform fee collection policy for mental retardation authorities.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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CHAPTER 97. LICENSING STANDARDS FOR HOME AND COMMUNITY SUPPORT SERVICES AGENCIES

SUBCHAPTER E. LICENSURE SURVEYS

DIVISION 2. THE SURVEY PROCESS

40 TAC §97.527

The Health and Human Services Commission (HHSC), on behalf of the Department of Aging and Disability Services (DADS), adopts an amendment to §97.527 in Chapter 97, governing Licensing Standards for Home and Community Support Services Agencies, without changes to the proposed text published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4339).

The amendment is adopted to provide a home and community support services agency (agency) with clearer direction and greater flexibility in responding to a statement of violation or deficiency. The amendment updates the time frames and procedures that an agency must follow to request an informal review of deficiencies (IRoD) and allows an agency submitting an IRoD request form additional time to submit a rebuttal letter and supporting documentation.

DADS received no comments regarding adoption of the amendment.

The amendment is adopted under Texas Government Code, §531.0055, which provides that the HHSC executive commissioner shall adopt rules for the operation and provision of services by the health and human services agencies, including DADS; Texas Human Resources Code, §161.021, which provides that the Aging and Disability Services Council shall study and make recommendations to the HHSC executive commissioner and the DADS commissioner regarding rules governing the delivery of services to persons who are served or regulated by DADS; and Texas Health and Safety Code, Chapter 142, which authorizes DADS to license and regulate home and community support services agencies.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Kenneth L. Owens
General Counsel
Department of Aging and Disability Services
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PART 2. DEPARTMENT OF ASSISTIVE AND REHABILITATIVE SERVICES

CHAPTER 106. DIVISION FOR BLIND SERVICES

The Texas Health and Human Services Commission (HHSC), on behalf of the Department of Assistive and Rehabilitative Services (DARS), adopts the repeals of Chapter 106, Subchapter A, Division 2, §§106.121, 106.123, 106.125, 106.127, 106.129, 106.131, 106.133, 106.135 and 106.137; Subchapter B, Division 1, §106.305; Subchapter B, Division 2, §§106.321, 106.323, 106.325, 106.327, 106.329, 106.331, 106.333, 106.335, 106.337, 106.339, 106.341, 106.343 and 106.345; Subchapter D, Division 1, §106.857; Subchapter I, Division 3, §106.1459 and Subchapter N, §§106.1901, 106.1903, 106.1905, 106.1907, 106.1909, 106.1911, 106.1913, 106.1915, 106.1917, 106.1919, 106.1921 and 106.1923. HHSC further adopts amendments to Subchapter B, Criss Cole Rehabilitation Center, Division 1, §106.302 and §106.303; Subchapter C, Vocational Rehabilitation Program, Division 1, §§106.503, 106.505, 106.507, and 106.509; Subchapter C, Division 2, §§106.523, 106.525, 106.527, 106.529, 106.531, 106.533 and 106.535; Subchapter C, Division 3, §§106.551, 106.553, 106.557, 106.559, 106.561,106.564, 106.566, 106.574, 106.578, 106.580 and 106.582; Subchapter C, Division 4, §106.605; Subchapter C, Division 5, §§106.621, 106.623, 106.625, 106.627, 106.631 and 106.633; Subchapter C, Division 6, §106.651; Subchapter C, Division 7, §106.661; Subchapter C, Division 8, §§106.671, 106.673 and 106.675; Subchapter D, Independent Living Program, Division 1, §106.851 and §106.855; Subchapter D, Division 2, §§106.873, 106.875, 106.877, 106.879 and 106.881; Subchapter D, Division 3, §106.901 and §106.903; Subchapter D, Division 5, §§106.931, 106.933, 106.935, 106.937, 106.939 and 106.941; Subchapter D, Division 6, §106.965; Subchapter F, Blindness Education, Screening and Treatment Program, §§106.1101, 106.1103, 106.1105 and 106.1107; Subchapter G, Business Enterprises of Texas, §§106.1201, 106.1203, 106.1205, 106.1207, 106.1211, 106.1213, 106.1215, 106.1217, 106.1219, 106.1221, 106.1223, 106.1225, 106.1227, 106.1229, and 106.1231; Subchapter I, Blind Children's Vocational Discovery and Development Program, Division 1, §§106.1401, 106.1403, 106.1405, 106.1407, 106.1409, 106.1411 and 106.1413; Subchapter I, Division 2, §§106.1421, 106.1423, 106.1425, 106.1427, 106.1429 and 106.1433; Subchapter I, Division 3, §§106.1445, 106.1447, 106.1449, 106.1451, 106.1453, 106.1455, 106.1457, 106.1461 and 106.1463; Subchapter I, Division 5, §§106.1485, 106.1487, and 106.1489; Subchapter I, Division 6, §106.1501; and Subchapter M, Donations, §§106.1801, 106.1803, 106.1805, 106.1807, 106.1809, 106.1811, and 106.1813. Sections §§106.605, 106.1205, 106.1207, and 106.1233, are adopted with changes to the proposed text as published in the May 11, 2007, issue of the *Texas Register* (32 TexReg 2557). The text of the rules will be republished. The remaining sections are adopted without changes to the proposed text as published in the May 11, 2007, issue of the *Texas Register* (32 TexReg 2557) and will not be republished.

HHSC also adopts changing the title of Chapter 106 from "Blind Services" to "Division for Blind Services."

The repeals, amendments and title change are being adopted to clarify and update program rules from the former Texas Commission for the Blind, which was consolidated into DARS in 2004, into rule applicable to programs now administered by the Division for Blind Services, DARS, as provided by House Bill 2292, 78th Legislature, Regular Session.

DARS received no comments regarding the adoption of the repeals, amendments, new rules, or title change.

SUBCHAPTER A. APPEALS AND HEARING PROCEDURES

DIVISION 2. BLIND CHILDREN'S VOCATIONAL DISCOVERY AND DEVELOPMENT PROGRAM

40 TAC §§106.121, 106.123, 106.125, 106.127, 106.129, 106.131, 106.133, 106.135, 106.137

The repeals are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. The repeals are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §§107 et seq.; and federal regulations, 34 CFR §§395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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SUBCHAPTER B. CRISS COLE REHABILITATION CENTER

DIVISION 1. GENERAL RULES

40 TAC §106.305

The repeal is adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health

and human services by health and human services agencies, which includes DARS. The repeal is also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §§107 et seq.; and federal regulations, 34 CFR §§395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

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DIVISION 2. INVESTIGATIONS OF ABUSE, NEGLECT, AND EXPLOITATION

40 TAC §§106.321, 106.323, 106.325, 106.327, 106.329, 106.331, 106.333, 106.335, 106.337, 106.339, 106.341, 106.343, 106.345

The repeals are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. The repeals are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §§107 et seq.; and federal regulations, 34 CFR §§395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. INDEPENDENT LIVING PROGRAM
DIVISION 1. GENERAL INFORMATION

40 TAC §106.857

The repeal is adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. The repeal is also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §§107 et seq.; and federal regulations, 34 CFR §§395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

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SUBCHAPTER I. BLIND CHILDREN'S VOCATIONAL DISCOVERY AND DEVELOPMENT PROGRAM
DIVISION 3. SERVICES

40 TAC §106.1459

The repeal is adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. The repeal is also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §§107 et seq.; and federal regulations, 34 CFR §§395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

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SUBCHAPTER N. ENDOWMENT LOAN FUND

40 TAC §106.1901, 106.1903, 106.1905, 106.1907, 106.1909, 106.1911, 106.1913, 106.1915, 106.1917, 106.1919, 106.1921, 106.1923

The repeals are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. The repeals are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §§107 et seq.; and federal regulations, 34 CFR §§395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

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SUBCHAPTER B. CRISS COLE REHABILITATION CENTER

DIVISION 1. GENERAL RULES

40 TAC §106.302, §106.303

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

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SUBCHAPTER C. VOCATIONAL REHABILITATION PROGRAM

DIVISION 1. GENERAL INFORMATION

40 TAC §§106.503, 106.505, 106.507, 106.509

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

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DIVISION 2. BASIC PROGRAM REQUIREMENTS

40 TAC §§106.523, 106.525, 106.527, 106.529, 106.531, 106.533, 106.535

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 3. VOCATIONAL REHABILITATION SERVICES

40 TAC §§106.551, 106.553, 106.557, 106.559, 106.561, 106.564, 106.566, 106.574, 106.578, 106.580, 106.582

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 4. ORDER OF SELECTION FOR SERVICES

40 TAC §106.605

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

§106.605. Order of Selection.

(a) If it becomes necessary, due to limited funds, for the Division to operate under an order of selection, vocational rehabilitation services shall be provided according to the following priorities:

(1) Priority 1--Persons who meet the definition of individual with a most significant disability.

(2) Priority 2--Persons who meet the definition of individual with a significant disability.

(3) Priority 3--Persons who meet the definition of individual with a disability.

(b) To inquire if the agency is operating under the order of selection, a person may contact any Division office, including the central office at 4800 North Lamar, Austin, Texas, toll-free 800-628-5115.

(c) In the event the order of selection is implemented, the Division shall:

(1) implement the order of selection on a statewide basis;

(2) notify all eligible individuals of the priority categories in the order of selection, their assignment to a particular category, and their right to appeal their category assignment;

(3) continue to provide all needed services to any consumer who has begun to receive services under an IPE prior to the effective date of the order of selection, irrespective of the severity of the individual's disability; and

(4) ensure that its funding arrangements for providing services under the State plan, including third-party arrangements and awards under the establishment authority, are consistent with the order of selection. If any funding arrangements are inconsistent with the order of selection, the Division shall renegotiate these funding arrangements so that they are consistent with the order of selection.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
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DIVISION 5. CONSUMER PARTICIPATION IN COST OF SERVICES

40 TAC §§106.621, 106.623, 106.625, 106.627, 106.631, 106.633

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 6. MAXIMUM AFFORDABLE PAYMENT

40 TAC §106.651

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 7. SERVICE PROVIDERS

40 TAC §106.661

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 8. CONFIDENTIALITY OF RECORDS

40 TAC §§106.671, 106.673, 106.675

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §§107 et seq.; and federal regulations, 34 CFR §§395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER D. INDEPENDENT LIVING PROGRAM

DIVISION 1. GENERAL INFORMATION

40 TAC §106.851, §106.855

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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DIVISION 2. BASIC PROGRAM REQUIREMENTS

40 TAC §§106.873, 106.875, 106.877, 106.879, 106.881

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and

human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §§107 et seq.; and federal regulations, 34 CFR §§395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

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DIVISION 3. INDEPENDENT LIVING SERVICES

40 TAC §106.901, §106.903

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

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DIVISION 5. CONSUMER PARTICIPATION IN COST OF SERVICES

40 TAC §§106.931, 106.933, 106.935, 106.937, 106.939, 106.941

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TRD-200704772
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Effective date: November 1, 2007
Proposal publication date: May 11, 2007
For further information, please call: (512) 424-4050

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DIVISION 6. MAXIMUM AFFORDABLE PAYMENT

40 TAC §106.965

The amendment is adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. The rule is also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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SUBCHAPTER F. BLINDNESS EDUCATION, SCREENING AND TREATMENT PROGRAM

40 TAC §§106.1101, 106.1103, 106.1105, 106.1107

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
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SUBCHAPTER G. BUSINESS ENTERPRISES OF TEXAS

40 TAC §§106.1201, 106.1203, 106.1205, 106.1207, 106.1211, 106.1213, 106.1215, 106.1217, 106.1219, 106.1221, 106.1223, 106.1225, 106.1227, 106.1229, 106.1231, 106.1233

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

§106.1205. General Policies.

(a) Objectives. The objectives of Business Enterprises of Texas shall be:

(1) to provide employment opportunities for qualified individuals; and

(2) to administer a continuing process of career development for managers which encourages them to move into the private sector of business.

(b) Relationship of BET to Vocational Rehabilitation Program. The intent of Business Enterprises of Texas, as authorized in the Randolph-Sheppard Act and the Texas Human Resources Code, is to stimulate and enlarge the economic opportunities for the citizens of Texas who are blind or visually impaired by establishing a vending facility program in which such persons who are in need of employment are given priority in the operation of vending facilities selected and installed by the DARS/DBS. The DARS/DBS is required to administer BET in accordance with the DARS/DBS vocational rehabilitation objectives. Therefore, a consumer receiving services from the Vocational Rehabilitation Program whose employment goal is to be a licensed manager shall have reached an employment outcome as that term is used in the Rehabilitation Act of 1973, as amended when the consumer is licensed by the DARS/DBS and is managing a BET facility. The licensed manager shall not be considered an employee of the DARS/DBS, state, or federal government.

(c) Full-time employment. Managing a BET facility shall constitute full-time employment. Full-time shall mean being actively engaged in the management of a BET facility for the number of hours necessary to achieve satisfactory operation of the facility. The manager shall be available for necessary visits by DARS/DBS staff to allow inspection, advice, and consultation as may be required to ensure satisfactory operation. Management means the personal supervision of the day-to-day operation of the assigned BET facility by the assigned manager.

(d) Subcontracting. The management of a BET facility shall not be subcontracted except for temporary periods of time approved by the DARS/DBS or in those circumstances in which the DARS/DBS deems that subcontracting the operation of some parts of the facility are in the best interest of BET. In all events, subcontracting shall require the prior written consent of the DARS/DBS. This subsection shall not affect subcontracts in existence on the effective date of this subsection. This subsection does not apply to equipment or machines allowed to be placed within the facility and not owned by or arranged for by the DARS/DBS.

(e) Availability of funds. The administration of BET and the implementation of these policies are contingent upon the availability of funds for the purposes stated herein.

(f) BET manual. All BET policies adopted by DARS/DBS shall be included in the BET manual. The BET director shall ensure that each licensee is provided with a copy of the manual and any revisions thereto. The licensee shall be responsible for reading the manual and acknowledging in writing that he or she has read and understands its contents. The BET director shall insure that the BET manual contains procedures whereby licensees may obtain assistance in understanding BET policies and procedures.

(g) Accessibility of BET materials. All information produced by and provided to licensees by the DARS/DBS shall be in an accessible format. When possible, materials will be sent in the format requested by the licensee.

(h) Nondiscrimination.

(1) VR and BET participants. The DARS/DBS shall not discriminate against any blind person who is participating in or who may wish to participate in Business Enterprises of Texas on the basis of sex, age, religion, color, creed, national origin, political affiliation, or physical or mental impairment, insofar as such impairment does not preclude satisfactory performance.

(2) BET facilities. Managers shall operate BET facilities without discriminating against any present or prospective supplier, customer, employee, or other individual who might come into contact with the facility on the basis of sex, age, religion, color, creed, national origin, political affiliation or physical or mental impairment.

(i) Emergencies. The BET director is authorized to expend funds on an emergency basis for the purpose of protecting the state's investment in a BET facility not to exceed $15,000 in a fiscal year or $2,500 per facility incident.

(j) Temporary management. From time to time it becomes necessary to designate a temporary manager to an unassigned facility to ensure uninterrupted service to the host and customers. Temporary assignments shall be for the period stated in the assignment document. Subsequent to the expiration of the timeframe stated in the assignment, the BET director shall review the temporary assignment every 90 days to determine the need for continuation of the temporary assignment. The temporary arrangement shall terminate when a new manager is assigned to the facility. The DARS/DBS shall choose temporary managers from licensees; if a licensee is not available, the DARS/DBS may contract with a private entity. Before a licensee is offered a temporary opportunity, the regional BET staff and local ECM representative shall discuss which licensee in the geographical location has the requisite skills to successfully manage the facility temporarily. Preference shall

be given to temporarily improving the income to lower income managers when more than one individual is qualified.

§106.1207. BET Administration.

(a) The Assistant Commissioner of the Division for Blind Services is authorized to:

(1) Supervise DARS/DBS;

(2) establish BET plans, which at a minimum shall provide for all services, assistance, training, supervision, and planning necessary for the implementation and administration of BET; and

(3) delegate authority to implement these rules to the BET director.

(b) BET director. In addition to the responsibilities delegated to the BET director by the Assistant Commissioner, the BET director shall be responsible for:

(1) implementing BET personnel policies and development plans; and

(2) disseminating the information developed by the Assistant Commissioner related to BET plans and policies to all licensees.

(c) Consultants.

(1) If the DARS/DBS determines a consultant is necessary to assist a manager or protect the interests of the agency, the DARS/DBS shall contract with a consultant and may pay for the consultant out of the facility revenues. The DARS/DBS shall not contract with a consultant when it possesses the expertise and staffing level to provide the consulting services.

(2) If the DARS/DBS determines a consultant is necessary to assist a manager who is currently in a facility, the BET director shall consult with the manager prior to contracting with a consultant. The final authority, however, for contracting with a consultant shall rest with the DARS/DBS.

(3) All consultant contracts entered into by the DARS/DBS for the provision of support and mentoring services to the manager shall not exceed three years in duration, provided, however, that the contract may be extended for additional periods not to exceed one year each. No contract shall be extended until the manager has been consulted. The final discretion to extend the contract shall rest with the DARS/DBS.

(4) If the DARS/DBS determines it necessary to contract with a consultant to protect the interests of the DARS/DBS, the DARS/DBS shall enter into a separate agreement for that purpose with such terms and conditions as the DARS/DBS may deem appropriate.

§106.1233. Forms.

The DARS/DBS adopts the following forms by reference. Copies are available from any local DARS/DBS office or by calling the agency's toll-free line (1-800-628-5115) and requesting a copy.

(1) BET Application (BE-114) dated October 1, 2006.

(2) Business Enterprises of Texas Monthly Facility Report, (BE-117), dated October 1, 2006.

(3) BET Assignment - Requirements for Operation of a Vending Facility Under Randolph-Sheppard Act and Applicable State Statutes Between DARS/DBS and a Licensed Vendor (BE-121), dated October 1, 2006.

(4) Equipment Loan Agreement (BE-122) dated October 1, 2006.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 8, 2007.

TRD-200704775
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
Effective date: November 1, 2007
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For further information, please call: (512) 424-4050

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SUBCHAPTER I. BLIND CHILDREN'S VOCATIONAL DISCOVERY AND DEVELOPMENT PROGRAM

DIVISION 1. GENERAL INFORMATION

40 TAC §§106.1401, 106.1403, 106.1405, 106.1407, 106.1409, 106.1411, 106.1413

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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DIVISION 2. BASIC PROGRAM REQUIREMENTS

40 TAC §§106.1421, 106.1423, 106.1425, 106.1427, 106.1429, 106.1433

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1

et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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For further information, please call: (512) 424-4050

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DIVISION 3. SERVICES

40 TAC §§106.1445, 106.1447, 106.1449, 106.1451, 106.1453, 106.1455, 106.1457, 106.1461, 106.1463

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §107 et seq.; and federal regulations, 34 CFR §395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
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DIVISION 5. ORDER OF SELECTION FOR PAYMENT OF SERVICES

40 TAC §§106.1485, 106.1487, 106.1489

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §§107 et seq.; and federal regulations, 34 CFR §§395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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DIVISION 6. CASE MANAGEMENT REIMBURSEMENT CHARGES

40 TAC §106.1501

The amendment is adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. The rule is also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §§107 et seq.; and federal regulations, 34 CFR §§395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 424-4050

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SUBCHAPTER M. DONATIONS

40 TAC §§106.1801, 106.1803, 106.1805, 106.1807, 106.1809, 106.1811, 106.1813

The amendments are adopted under Government Code, Chapter 531, §531.0055(e), which provides the Executive Commissioner of the Health and Human Services Commission with the authority to promulgate rules for the operation and provision of health and human services by health and human services agencies, which includes DARS. These rules are also promulgated pursuant to federal authority under the Randolph-Sheppard Act, 20 U.S.C. §§107 et seq.; and federal regulations, 34 CFR §§395.1 et seq.; and having been approved by the federal Rehabilitation Services Administration.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on October 8, 2007. ♦ ♦ ♦

TRD-200704781
Sylvia F. Hardman
General Counsel
Department of Assistive and Rehabilitative Services
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Proposal publication date: May 11, 2007
For further information, please call: (512) 424-4050

TRANSFERRED RULES

The Government Code, §2002.058, authorizes the Secretary of State to remove or transfer rules within the Texas Administrative Code when the agency that promulgated the rules is abolished. The Secretary of State will publish notice of rule transfer or removal in this section of the *Texas Register*. The effective date of a rule transfer is the date set by the legislature, not the date of publication of notice. Proposed or emergency rules are not subject to administrative transfer.

Texas Health and Human Services Commission

Rule Transfer

House Bill 4062, 80th Legislative Session, 2007, effective June 15, 2007, transferred the administration of the Special Nutrition Programs (Programs), currently administered by the Health and Human Services (HHSC) to the Texas Department of Agriculture (the Department). The effective date of the transfer of the programs was October 1, 2007, as approved by the United States Department of Agriculture, Food and Nutrition Service. Under the bill, rules of the HHSC pertaining to the Special Nutrition Programs transfer to the Department on the effective date of the Program transfer and continue in effect as the rules of the Department until superseded by an act of the Department.

The majority of the HHSC Special Nutrition Program rules previously found in *Texas Administrative Code* (TAC), Title 1, Part 15, Chapters 377 and 378 have been transferred and reorganized under *Texas Administrative Code*, Title 4, Part 1, Chapters 24 and 25. The transfer of those rules were published in the September 28, 2007, issue of the *Texas Register* (32 TexReg 6793). This submission covers additional rules that are in Chapter 378 and are transferred to the Department, effective October 1, 2007.

Please refer to Figure: 1 TAC Chapter 378, to see the complete conversion chart.

Figure: 1 TAC Chapter 378

TRD-200704745

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Texas Department of Agriculture

Rule Transfer

House Bill 4062, 80th Legislative Session, 2007, effective June 15, 2007, transferred the administration of the Special Nutrition Programs (Programs), currently administered by the Health and Human Services (HHSC) to the Texas Department of Agriculture (the Department). The effective date of the transfer of the programs was October 1, 2007, as approved by the United States Department of Agriculture, Food and Nutrition Service. Under the bill, rules of the HHSC pertaining to the Special Nutrition Programs transfer to the Department on the effective date of the Program transfer and continue in effect as the rules of the Department until superseded by an act of the Department.

The majority of the HHSC Special Nutrition Program rules previously found in *Texas Administrative Code* (TAC), Title 1, Part 15, Chapters 377 and 378 have been transferred and reorganized under *Texas Administrative Code*, Title 4, Part 1, Chapters 24 and 25. The transfer of those rules were published in the September 28, 2007, issue of the *Texas Register* (32 TexReg 6793). This submission covers additional rules that are in Chapter 378 and are transferred to the Department, effective October 1, 2007.

Please refer to Figure: 1 TAC Chapter 378, to see the complete conversion chart.

Figure: 1 TAC Chapter 378

TRD-200704744

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Figure: 1 TAC Chapter 378

Current Rules from Title 1, Part 15 Texas Health and Human Services Commission Chapter 378. Special Nutrition Programs				**Transferred to Title 4, Part 1 Texas Department of Agriculture Chapter 25. Special Nutrition Programs**			
Subchapter and Division		**Section**	**Heading**	**Subchapter and Division**		**Section**	**Heading**
A			**Child and Adult Care Food Program (CACFP)**	**A**			**Child and Adult Care Food Program (CACFP)**
	12		**Advance Payments**		**12**		**Advance Payments**
		§378.281	Does DHS issue and monitor advance payments to contractors according to a specific procedure?			§25.281	Does DHS issue and monitor advance payments to contractors according to a specific procedure?
		§378.282	How must a contractor account for advance funds?			§25.282	How must a contractor account for advance funds?
		§378.283	How does DHS issue advance payments to a contractor that has a claim history?			§25.283	How does DHS issue advance payments to a contractor that has a claim history?
		§378.284	How does DHS issue advance payments to a contractor that does not have a claim history?			§25.284	How does DHS issue advance payments to a contractor that does not have a claim history?
		§378.285	How does DHS estimate advance payment amounts?			§25.285	How does DHS estimate advance payment amounts?
		§378.286	Does DHS issue retroactive advances?			§25.286	Does DHS issue retroactive advances?
		§378.287	What happens if USDA does not provide sufficient funds for DHS to pay both advance payments and claims for reimbursement in full?			§25.287	What happens if USDA does not provide sufficient funds for DHS to pay both advance payments and claims for reimbursement in full?
		§378.288	How does DHS recoup advance payments?			§25.288	How does DHS recoup advance payments?
		§378.289	What happens if the advance payment exceeds the reimbursement earned in the month for which the advance is issued?			§25.289	What happens if the advance payment exceeds the reimbursement earned in the month for which the advance is issued?
		§378.290	What happens if a contractor who sponsors day care homes does not comply with program requirements?			§25.290	What happens if a contractor who sponsors day care homes does not comply with program requirements?
	15		**Overpayments**		**15**		**Overpayments**
		§378.381	How does DHS manage overpayment of claims for reimbursement, advance payments, start-up, and expansion fund payments?			§25.381	How does DHS manage overpayment of claims for reimbursement, advance payments, start-up, and expansion fund payments?

	18		**Sanctions, Penalties, and Fiscal Action**		**18**		**Sanctions, Penalties, and Fiscal Action**
		§378.447	What happens if DHS determines during the follow-up review that the day care home sponsor has not corrected all program noncompliances identified in the initial review?			§25.447	What happens if DHS determines during the follow-up review that the day care home sponsor has not corrected all program noncompliances identified in the initial review?
		§378.451	What happens if DHS determines during the follow-up review that 10% or more of the meals sampled and claimed for reimbursement for the test month fail to meet program requirements?			§25.451	What happens if DHS determines during the follow-up review that 10% or more of the meals sampled and claimed for reimbursement for the test month fail to meet program requirements?
		§378.455	What happens if DHS determines during the follow-up review that the day care home sponsor has not corrected all instances of program noncompliance identified in the initial review?			§25.455	What happens if DHS determines during the follow-up review that the day care home sponsor has not corrected all instances of program noncompliance identified in the initial review?

REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Adopted Rule Reviews

Texas Department of Insurance, Division of Workers' Compensation

Title 28, Part 2

Pursuant to the notice of proposed rule review published in the April 20, 2007, issue of the *Texas Register* (32 TexReg 2287), the Texas Department of Insurance, Division of Workers' Compensation has reviewed and considered for readoption, revision or repeal all sections as they existed on April 20, 2007, of the following chapters of Title 28, Part 2 of the Texas Administrative Code, in accordance with Texas Government Code §2001.039: Chapter 41, concerning Practice and Procedure, Subchapter A concerning Communications, Chapter 42 concerning Medical Benefits and Chapter 63 concerning Promptness of First Payment.

The Department considered, among other things, whether the reasons for adoption of these rules continue to exist. The Department received no written comments regarding the review of its rules.

The Department has determined that the reasons for adopting the remaining sections continue to exist and those sections are retained in their present form. However, other sections that were reviewed may be subsequently revised in accordance with the Department's internal procedures. Any such revisions will be accomplished in accordance with the Texas Administrative Procedure Act.

This concludes the Department's review of Chapters 41, 42 and 63. The completion of the review of these chapters concludes the rule review process.

TRD-200704788
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: October 8, 2007

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Texas Department of Licensing and Regulation

Title 16, Part 4

The Texas Department of Licensing and Regulation (Department) filed a notice of intent to review and consider for re-adoption, revision, or repeal, Title 16, Texas Administrative Code (TAC), Part 4, Chapter 58, Rental Purchase Agreements in accordance with the requirements of Texas Government Code, §2001.039. The Notice of Intent to Review was published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4453).

In accordance with the requirements of Texas Government Code, §2001.039, the Department reviewed the administrative rules of 16 TAC Chapter 58, Rental Purchase Agreements to determine if the rules are obsolete, reflect current legal and policy considerations, and reflect current procedures of the Department.

The Department's review determined that the reasons for initially adopting the rules continue to exist. The rules continue to be essential in implementing the provisions of Texas Business and Commerce Code, Title 4, Chapter 35, Subchapter F, and the Department recommends to the Texas Commission of Licensing and Regulation (Commission) the re-adoption of Chapter 58. Based on the Department's review, however, the Department proposes that amendments be made which may be helpful in clarifying statutory and administrative rule requirements and bring them more in line with current law and Department procedures.

Proposed changes to these rules as a result of the rule review will be published in the Proposed Rules section of the *Texas Register.* The proposed rules will be open for public comment prior to final adoption or repeal by the Commission in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

The Notice of Intent to Review was published in the July 13, 2007, issue of the *Texas Register* and distributed to persons internal and external to the agency. The public comment period closed on August 13, 2007. No comments were received in response to the Notice of Intent to Review.

The rules are re-adopted by the Commission in accordance with Texas Government Code, §2001.039. This concludes the review of 16 TAC, Chapter 58, Rental Purchase Agreements.

TRD-200704687
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: October 4, 2007

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The Texas Department of Licensing and Regulation (Department) filed a notice of intent to review and consider for re-adoption, revision, or repeal, Title 16, Texas Administrative Code (TAC), Part 4, Chapter 65, Boilers in accordance with the requirements of Texas Government Code, §2001.039. The Notice of Intent to Review was published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4453).

In accordance with the requirements of Texas Government Code, §2001.039, the Department reviewed the administrative rules of 16 TAC Chapter 65, Boilers to determine if the rules are obsolete, reflect

current legal and policy considerations, and reflect current procedures of the Department.

The Department's review determined that the reasons for initially adopting the rules continue to exist. The rules continue to be essential in implementing the provisions of Texas Health and Safety Code, Chapter 755, and the Department recommends to the Texas Commission of Licensing and Regulation (Commission) the re-adoption of Chapter 65. Based on the Department's review, however, the Department proposes that amendments be made which may be helpful in clarifying statutory and administrative rule requirements and bring them more in line with current law and Department procedures.

Proposed changes to these rules as a result of the rule review will be published in the Proposed Rules section of the *Texas Register.* The proposed rules will be open for public comment prior to final adoption or repeal by the Commission in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

The Notice of Intent to Review was published in the July 13, 2007, issue of the *Texas Register* and distributed to persons internal and external to the agency. The public comment period closed on August 13, 2007. No comments were received in response to the Notice of Intent to Review.

The rules are re-adopted by the Commission in accordance with Texas Government Code, §2001.039. This concludes the review of 16 TAC, Chapter 65, Boilers.

TRD-200704688
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: October 4, 2007

♦ ♦ ♦

The Texas Department of Licensing and Regulation (Department) filed a notice of intent to review and consider for re-adoption, revision, or repeal, Title 16, Texas Administrative Code (TAC), Part 4, Chapter 73, Electricians in accordance with the requirements of Texas Government Code, §2001.039. The Notice of Intent to Review was published in the July 13, 2007, issue of the *Texas Register* (32 TexReg 4454).

In accordance with the requirements of Texas Government Code, §2001.039, the Department reviewed the administrative rules of 16 TAC Chapter 73, Electricians to determine if the rules are obsolete, reflect current legal and policy considerations, and reflect current procedures of the Department.

The Department's review determined that the reasons for initially adopting the rules continue to exist. The rules continue to be essential in implementing the provisions of Texas Occupations Code, Chapter 1305, and the Department recommends to the Texas Commission of Licensing and Regulation (Commission) the re-adoption of Chapter 73. Based on the Department's review, however, the Department proposes that amendments be made which may be helpful in clarifying statutory and administrative rule requirements and bring them more in line with current law and Department procedures.

Proposed changes to these rules as a result of the rule review will be published in the Proposed Rules section of the *Texas Register.* The proposed rules will be open for public comment prior to final adoption or repeal by the Commission in accordance with the requirements of the Administrative Procedure Act, Texas Government Code, Chapter 2001.

The Notice of Intent to Review was published in the July 13, 2007, issue of the *Texas Register* and distributed to persons internal and external to the agency. The public comment period closed on August 13, 2007. Three comments were received in response to the Notice of Intent to Review.

One commenter expressed a concern about exempting from licensure persons who install photovoltaic systems. Exemptions from licensure under Occupations Code, Chapter 1305 would be in the form of statutory exemptions, and would not be the subject of agency rulemaking.

Another commenter raised a concern about §73.20 of the rules, and the requirement that an individual hold a journeyman's license for two years before submitting an application for a master's license. This requirement is statutory, and cannot be changed by agency rulemaking. In addition, the commenter asked whether there could be a rule to allow the board to conduct a personal interview of an applicant upon request. Such an interview with the Board would be inconsistent with the department's streamlined process for application review.

A final commenter asked the Department to broaden the exemption found in Texas Occupations Code, §1305.003(a)(10) to specifically mention Dynamic Message Signs within public rights-of-way. This exemption is statutory and cannot be changed or expanded by agency rulemaking.

The rules are re-adopted by the Commission in accordance with Texas Government Code, §2001.039. This concludes the review of 16 TAC, Chapter 73, Electricians.

TRD-200704689
William H. Kuntz, Jr.
Executive Director
Texas Department of Licensing and Regulation
Filed: October 4, 2007

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 31 TAC §65.331(d)

Frogs and Toads

Great Plains toad (*Bufo cognatus*)

Green toad (*Bufo debilis*)

Red-spotted toad (*Bufo punctatus*)

Texas toad (*Bufo speciosus*)

Gulf Coast toad (*Bufo valliceps*)

Woodhouse's toad (*Bufo woodhousei*)

Green treefrog (*Hyla cinerea*)

Bull frog (*Rana catesbeiana*)

Couch's spadefoot (*Scaphiopus couchii*)

Plains spadefoot (*Spea bombifrons*)

New Mexico spadefoot (*Spea multiplicata*)

Salamanders

Tiger salamander (*Ambystoma tigrinum*)

Lizards

Green anole (*Anolis carolinensis*)

Chihuahuan spotted whiptail (*Aspidoscelis exsanguis*)

Texas spotted whiptail (*Aspidoscelis gularis*)

Marbled whiptail (*Aspidoscelis marmoratus*)

Six-lined racerunner (*Aspidoscelis sexlineatus*)

Checkered whiptail (*Aspidoscelis tesselatus*)

Texas banded gecko (*Coleonyx brevis*)

Greater earless lizard (*Cophosaurus texanus*)

Collared lizard (*Crotaphytus collaris*)

Five-lined skink (*Eumeces fasciatus*)

Great plains skink (*Eumeces obsoletus*)

Texas alligator lizard (*Gerrhonotus infernalis*)

Lesser earless lizard (*Holbrookia maculata*)

Crevice spiny lizard (*Sceloporus poinsettii*)

Prairie lizard (*Sceloporus undulatus*)

Ground skink (*Scincella lateralis*)

Tree lizard (*Urosaurus ornatus*)

Side-blotched lizard (*Uta stansburiana*)

Snakes

Copperhead (*Agkistrodon contortrix*)

Cottonmouth (*Agkistrodon piscivorus*)

Glossy snake (*Arizona elegans*)

Trans-Pecos rat snake (*Bogertophis subocularis*)

Racer (*Coluber constrictor*)

Western diamondback rattlesnake (*Crotalus atrox*)

Rock rattlesnake (*Crotalus lepidus*)

Blacktail rattlesnake (*Crotalus molossus*)

Mojave rattlesnake (*Crotalus scutulatus*)

Prairie rattlesnake (*Crotalus viridis*)

Baird's rat snake (*Elaphe bairdi*)

Great Plains rat snake (*Elaphe emoryi*)

Texas rat snake (*Elaphe obsoleta*)

Slowinski's cornsnake (*Elaphe slowinskii*)

Western hognose snake (*Heterodon nasicus*)

Eastern hognose snake (*Heterodon platirhinos*)

Texas night snake (*Hypsiglena torquata*)

Gray-banded kingsnake (*Lampropeltis alterna*)

Prairie kingsnake (*Lampropeltis calligaster*)

Speckled or desert kingsnake (*Lampropeltis getula*)

Milk snake (*Lampropeltis triangulum*)

Texas blind snake (*Leptotyphlops dulcis*)

Coachwhip (*Masticophis flagellum*)

Schott's whipsnake (*Masticophis schotti*)

Striped whipsnake (*Masticophis taeniatus*)

Texas coral snake (*Micrurus tener*)

Blotched or yellowbelly water snake (*Nerodia erythrogaster*)

Broad-banded water snake (*Nerodia fasciata*)

Diamondback water snake (*Nerodia rhombifer*)

Rough green snake (*Opheodrys aestivus*)

Bullsnake or gopher snake (*Pituophis catenifer*)

Texas longnose snake (*Rhinocheilus lecontei*)

Western blackneck garter snake (*Thamnophis cyrtopsis*)

Checkered garter snake (*Thamnophis marcianus*)

Western ribbon snake (*Thamnophis proximus*)

Big Bend patchnose snake (*Salvadora deserticola*)

Texas or mountain patchnose snake (*Salvadora grahamiae*)

Massasauga (*Sistrurus catenatus*)

Pygmy rattlesnake (*Sistrurus miliarius*)

Ground snake (*Sonora semiannulata*)

Brown snake (*Storeria dekayi*)

Flathead snake (*Tantilla gracilis*)

Southwestern blackhead snake (*Tantilla hobartsmithi*)

Plains blackhead snake (*Tantilla nigriceps*)

Lined snake (*Tropidoclonion lineatum*)

Rough earth snake (*Virginia striatula*)

Mammals

Texas Antelope Squirrel (*Ammospermophilus interpres*)

Black-tailed Prairie Dog (*Cynomys ludovicianus*)

Merriam's Kangaroo Rat (*Dipodomys merriami*)

Eastern Flying Squirrel (*Glaucomys volans*)

Black-tailed Jackrabbit (*Lepus californicus*)

Spotted Ground Squirrel (*Spermophilus spilosoma*)

Thirteen-lined Ground Squirrel (*Spermophilus tridecemlineatus*)

Rock Squirrel (*Spermophilus variegatus*)

Figure: 31 TAC §65.331(e)

Salamanders

Three-toed Amphiuma (*Amphiuma tridactylum*)

Gulf Coast Waterdog (*Necturus beyeri*)

Lesser Siren (*Siren intermedia*)

Spotted Salamander (*Ambystoma maculatum*)

Marbled Salamander (*Ambystoma opacum*)

Mole Salamander (*Ambystoma talpoideum*)

Small-mouthed Salamander (*Ambystoma texanum*)

Southern Dusky Salamander (*Desmognathus auriculatus*)

Salado Salamander (*Eurycea chisholmensis*)

Texas Salamander (*Eurycea neotenes*)

Dwarf Salamander (*Eurycea quadridigitata*)

Jollyville Plateau Salamander (*Eurycea tonkawae*)

Valdina Farms Salamander (*Eurycea troglodytes*)

Western Slimy Salamander (*Plethodon albagula*)

Southern Red-backed Salamander (*Plethodon serratus*)

Eastern Newt (*Notophthalmus viridescens*)

Frogs and Toads

American Toad (*Bufo americanus*)

Cane Toad (*Bufo marinus*)

Cricket Frog (*Acris crepitans*)

Canyon Treefrog (*Hyla arenicolor*)

Cope's Gray Treefrog (*Hyla chrysoscelis*)

Squirrel Treefrog (*Hyla squirella*)

Gray Treefrog (*Hyla versicolor*)

Spotted Chorus Frog (*Pseudacris clarki*)

Spring Peeper (*Pseudacris crucifer*)

Southeastern Chorus Frog (*Pseudacris feriarum*)

Strecker's Chorus Frog (*Pseudacris streckeri*)

Barking Frog (*Eleutherodactylus augusti*)

Rio Grande Chirping Frog (*Eleutherodactylus cystignathoides*)

Spotted Chirping Frog (*Eleutherodactylus guttilatus*)

Cliff Chirping Frog (*Eleutherodactylus marnockii*)

Eastern Narrow-mouthed Toad (*Gastrophryne carolinensis*)

Great Plains Narrow-mouthed Toad (*Gastrophryne olivacea*)

Hurter's Spadefoot (*Scaphiopus hurterii*)

Crawfish Frog (*Rana areolata*)

Rio Grande Leopard Frog (*Rana berlandieri*)

Plains Leopard Frog (*Rana blairi*)

Green Frog (*Rana clamitans*)

Pig Frog (*Rana grylio*)

Pickerel Frog (*Rana palustris*)

Southern Leopard Frog (*Rana sphenocephala*)

Turtles

Painted Turtle (*Chrysemys picta*)

Chicken Turtle (*Deirochelys reticularia*)

Mississippi Map Turtle (*Graptemys kohni*)

Ouachita Map Turtle (*Graptemys ouachitensis*)

Texas Map Turtle (*Graptemys versa*)

River Cooter (*Pseudemys concinna*)

Rio Grande Cooter (*Pseudemys gorzugi*)

Texas River Cooter (*Pseudemys texana*)

Eastern Box Turtle (*Terrapene carolina*)

Ornate Box Turtle (*Terrapene ornata*)

Big Bend Slider (*Trachemys gaigeae*)

Yellow Mud Turtle (*Kinosternon flavescens*)

Rough-footed Mud Turtle (*Kinosternon hirtipes*)

Eastern Mud Turtle (*Kinosternon subrubrum*)

Razor-backed Musk Turtle (*Sternotherus carinatus*)

Stinkpot (*Sternotherus odoratus*)

Lizards

Slender Glass Lizard (*Ophisaurus attenuatus*)

Long-nosed Leopard Lizard (*Gambelia wislizenii*)

Spot-tailed Earless Lizard (*Holbrookia lacerata*)

Keeled Earless Lizard (*Holbrookia propinqua*)

Round-tailed Horned Lizard (*Phrynosoma modestum*)

Dunes Sagebrush Lizard (*Sceloporus arenicolus*)

Blue Spiny Lizard (*Sceloporus cyanogenys*)

Graphic Spiny Lizard (*Sceloporus grammicus*)

Desert Spiny Lizard (*Sceloporus magister*)

Canyon Lizard (*Sceloporus merriami*)

Texas Spiny Lizard (*Sceloporus olivaceus*)

Rose-bellied Lizard (*Sceloporus variabilis*)

Coal Skink (*Eumeces anthracinus*)

Broad-headed Skink (*Eumeces laticeps*)

Many-lined Skink (*Eumeces multivirgatus*)

Prairie Skink (*Eumeces septentrionalis*)

Four-lined Skink (*Eumeces tetragrammus*)

Gray Checkered Whiptail (*Aspidocelis dixoni*)

Little Striped Whiptail (*Aspidocelis inornata*)

Laredo Striped Whiptail (*Aspidocelis laredoensis*)

New Mexico Whiptail (*Aspidocelis neomexicana*)

Mexican Plateau Spotted Whiptail (*Aspidocelis septemvittata*)

Desert Grassland Whiptail (*Aspidocelis uniparens*)

Snakes

New Mexico Blind Snake (*Leptotyphlops dissectus*)

Western Blind Snake (*Leptotyphlops humilis*)

Western Wormsnake (*Carphophis vermis*)

Ring-necked Snake (*Diadophis punctatus*)

Red-bellied Mudsnake (*Farancia abacura*)

Tamaulipan Hook-nosed Snake (*Ficimia streckeri*)

Chihuahuan Hooked-nosed Snake (*Gyalopion canum*)

Saltmarsh Snake (*Nerodia clarki*)

Mississippi Green Watersnake (*Nerodia cyclopion*)

Cornsnake (*Pantherophis guttata*)

Graham's Crayfish Snake (*Regina grahamii*)

Glossy Crayfish Snake (*Regina rigida*)

Red-bellied Snake (*Storeria occipitomaculata*)

Mexican Black-headed Snake (*Tantilla atriceps*)

Plains Gartersnake (*Thamnophis radix*)

Common Gartersnake (*Thamnophis sirtalis*)

Smooth Earthsnake (*Virginia valeriae*)

Mammals

Southern Short-tailed Shrew (*Blarina carolinensis*)

Elliot's Short-tailed Shrew (*Blarina hylophaga*)

Least Shrew (*Cryptotis parva*)

Desert Shrew (*Notiosorex crawfordi*)

Eastern Mole (*Scalopus aquaticus*)

Pallid Bat (*Antrozous pallidus*)

Mexican Long-tongued Bat (*Choeronycteris mexicana*)

Big Brown Bat (*Eptesicus fuscus*)

Western Mastiff Bat (*Eumops perotis*)

Silver-haired Bat (*Lasionycteris noctivagans*)

Western Red Bat (*Lasiurus blossevillii*)

Eastern Red Bat (*Lasiurus borealis*)

Hoary Bat (*Lasiurus cinereus*)

Northern Yellow Bat (*Lasiurus intermedius*)

Seminole Bat (*Lasiurus seminolus*)

Ghost-faced Bat (*Mormoops megalophylla*)

Southeastern Myotis (*Myotis austroriparius*)

California Myotis (*Myotis californicus*)

Western Small-footed Myotis (*Myotis ciliolabrum*)

Little Brown Myotis (*Myotis lucifugus*)

Northern Myotis (*Myotis septentrionalis*)

Fringed Myotis (*Myotis thysanodes*)

Cave Myotis (*Myotis velifer*)

Long-legged Myotis (*Myotis volans*)

Yuma Myotis (*Myotis yumanensis*)

Evening Bat (*Nycticeius humeralis*)

Pocketed Free-tailed Bat (*Nyctinomops femorosacca*)

Big Free-tailed Bat (*Nyctinomops macrotis*)

Western Pipistrelle (*Pipistrellus hesperus*)

Eastern Pipistrelle (*Pipistrellus subflavus*)

Townsend's Big-eared Bat (*Plecotus townsendii*)

Brazilian Free-tailed Bat (*Tadarida brasiliensis*)

Mexican Ground Squirrel (*Spermophilus mexicanus*)

Gray-footed Chipmunk (*Tamias canipes*)

Yellow-faced Pocket Gopher (*Cratogeomys castanops*)

Desert Pocket Gopher (*Geomys arenarius*)

Attwater's Pocket Gopher (*Geomys attwateri*)

Baird's Pocket Gopher (*Geomys breviceps*)

Plains Pocket Gopher (*Geomys bursarius*)

Jones' Pocket Gopher (*Geomys knoxjonesi*)

Texas Pocket Gopher (*Geomys personatus*)

Llano Pocket Gopher (*Geomys texensis*)

Botta's Pocket Gopher (*Thomomys bottae*)

Northern Pygmy Mouse (*Baiomys taylori*)

Hispid Pocket Mouse (*Chaetodipus hispidus*)

Rock Pocket Mouse (*Chaetodipus intermedius*)

Nelson's Pocket Mouse (*Chaetodipus nelsoni*)

Desert Pocket Mouse (*Chaetodipus penicillatus*)

Gulf Coast Kangaroo Rat (*Dipodomys compactus*)

Ord's Kangaroo Rat (*Dipodomys ordii*)

Banner-tailed Kangaroo Rat (*Dipodomys spectabilis*)

Mexican Spiny Pocket Mouse (*Liomys irroratus*)

Mexican Vole (*Microtus mexicanus*)

Prairie Vole (Microtus ochrogaster)

Woodland Vole (*Microtus pinetorum*)

House Mouse (*Mus musculus*)

White-throated Woodrat (*Neotoma albigula*)

Eastern Woodrat (*Neotoma floridana*)

Golden Mouse (*Ochrotomys nuttalli*)

Mearns' Grasshopper Mouse (*Onychomys arenicola*)

Northern Grasshopper Mouse (*Onychomys leucogaster*)

Marsh Rice Rat (*Oryzomys palustris*)

Plains Pocket Mouse (*Perognathus flavescens*)

Silky Pocket Mouse (*Perognathus flavus*)

Merriam's Pocket Mouse (*Perognathus merriami*)

Texas Mouse (*Peromyscus attwateri*)

Brush Mouse (*Peromyscus boylii*)

Cactus Mouse (*Peromyscus eremicus*)

Cotton Mouse (*Peromyscus gossypinus*)

White-footed Mouse (*Peromyscus leucopus*)

Deer Mouse (*Peromyscus maniculatus*)

Northern Rock Mouse (*Peromyscus nasutus*)

White-ankled Mouse (*Peromyscus pectoralis*)

Piñon Mouse (*Peromyscus truei*)

Fulvous Harvest Mouse (*Reithrodontomys fulvescens*)

Eastern Harvest Mouse (*Reithrodontomys humulis*)

Western Harvest Mouse (*Reithrodontomys megalotis*)

Plains Harvest Mouse (*Reithrodontomys montanus*)

Mexican Woodrat (*Neotoma mexicana*)

Southern Plains Woodrat (*Neotoma micropus*)

Tawny-bellied Cotton Rat (*Sigmodon fulviventer*)

Hispid Cotton Rat (*Sigmodon hispidus*)

Yellow-nosed Cotton Rat (*Sigmodon ochrognathus*)

Porcupine (*Erethizon dorsatum*)

Long-tailed Weasel (*Mustela frenata*)

Figure: 40 TAC §97.602(e)(1)

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.23	Change of ownership.
§97.25(a)	Application for an initial license after a change of ownership.
§97.212	Prohibiting material alteration of a license.
§97.213(a)-(b) separate penalties	Agency relocation.
§97.214(a)-(b) separate penalties	Notification procedures for reporting a change in agency telephone number and agency operating hours.
§97.215(a)(1)-(3) separate penalties	Notification procedures for reporting an agency name change.
§97.216	Change in agency certification or accreditation status.
§97.217(b)(1)-(2) separate penalties	Procedures for notifying DADS of a voluntary suspension of operations.
§97.218	Agency organizational changes.
§97.219(1)(A)-(B) separate penalties	Procedure for adding or deleting a category of service to the agency's license.
§97.220(a)(1)-(2) separate penalties	Providing services only within an agency's licensed service area.
§97.220(c)	Providing a written notification of an expansion of an agency's licensed service area.
§97.220(d)	Providing written notification of a reduction of an agency's licensed service area.
§97.220(e)	Location requirements for a branch office and an alternate delivery site in the parent agency's service area.
§97.242(a)-(b)	Maintaining a current written description of the agency's organizational structure.
§97.243(a)(1)	Designating a qualified administrator.
§97.243(a)(2)	Designating a qualified alternate administrator.
§97.243(b)(1)(A)-(G) separate penalties	Responsibilities of the administrator.
§97.243(b)(2)	Requirement that the administrator or alternate administrator be available during the agency's operating hours.
§97.243(b)(3)	Requirement that the administrator designate in writing an agency employee who must provide DADS surveyors entry to the agency.
§97.243(d)(1)-(2) separate penalties	Adoption of a written policy for the supervision of branch offices or alternate delivery sites, if established.
§97.244(a)(1)-(2) separate penalties	Qualifications of the agency administrator and alternate administrator.
§97.244(b)(1)-(5) separate penalties	Conditions of the agency administrator and alternate administrator.
§97.244(c)(1)-(2) separate penalties	Qualifications of the supervising nurse and alternate supervising nurse.
§97.245(1)-(9) separate penalties	Adoption of written policies governing all personnel staffed by the agency.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.246(a)(1)-(5)-(b) separate penalties	An agency's personnel records and content of such records.
§97.248(a)-(b)(1)-(4) separate penalties	The use of volunteers in an agency.
§97.249(b)	Adoption of a written policy for the reporting of alleged acts of abuse, neglect, and exploitation of clients and reportable conduct by an employee.
§97.250(a)	Adoption of a written policy covering procedures for investigating known and alleged acts of abuse, neglect, and exploitation and other complaints.
§97.250(d)	Prohibiting an agency from retaliating against a person for filing a complaint, presenting a grievance, or providing, in good faith, information the agency.
§97.251	Adoption of a written policy for ensuring that all professional disciplines comply with their respective professional practice acts or title acts for reporting and peer review.
§97.252(3)-(4) separate penalties	An agency's business records.
§97.253(a)-(d) separate penalties	Adoption of a written policy describing whether an agency will conduct drug testing of employees that describes the method and provides a copy of the policy.
§97.254	Adoption of a written policy for ensuring that the agency submits accurate billings and insurance claims.
§97.255	Adoption of a written policy for prohibition of illegal remuneration for securing or soliciting clients or patronage.
§97.256(1)(A)-(M) separate penalties	Development and documentation of a written emergency preparedness and response plan.
§97.259(g)	Prohibiting use of the presurvey conference to meet initial training requirements for a first-time administrator and alternate administrator.
§97.259(f)(1)-(2) separate penalties	Documentation requirements for initial educational training of a first-time administrator and alternate administrator.
§97.260(c)(1)-(2) separate penalties	Documentation requirements for continuing education of an administrator and alternate administrator.
§97.260(d)	Prohibiting use of the pre-survey conference to meeting continuing education requirements for an administrator and alternate administrator.
§97.281(1)-(16) separate penalties	Adoption of a written policy that specifies the agency's client care practices.
§97.282(a)-(f)(1)-(7) separate penalties	Adoption of a written policy governing client conduct and responsibility and client rights.
§97.283	Adoption of a written policy for compliance with the Advance Directives Act, Health and Safety Code, Chapter 166.
§97.284	Adoption of a written policy for complying with the Clinical Laboratory Improvement Amendments of 1988, 42 USC, §263a, Certification of Laboratories (CLIA 1988).
§97.285(1)-(2) separate penalties	Adoption of a written policy that addresses infection control.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.286(a)	Adoption of a written policy for safe handling and disposal of biohazardous waste and materials, if applicable.
§97.288(a)	Adoption of a written policy that all service providers involved in the care of a client effectively coordinate the client's care.
§97.290(a)(1)-(2) separate penalties	Adoption of a written policy for ensuring that backup services are available when an agency employee or contractor is not available to deliver the services.
§97.290(b)	Adoption of a written policy for ensuring that clients are educated in how to access care from the agency or another health care provider after regular business hours.
§97.291(1)-(2)(A)-(C) separate penalties	Adoption of a written policy for an agency's written contingency plan.
§97.292(a)(1)-(7)-(b) separate penalties	Providing a client or a client's family with a written agreement for services, ensuring appropriate content of the agreement, obtaining an acknowledgement of receipt, and ensuring that the acknowledgement is in the client's record.
§97.293(1)-(2) separate penalties	Maintaining a current list of clients for each category of service licensed.
§97.294	Adoption of a written policy for establishing a time frame for the initiation of care or services.
§97.295(f)	Documentation requirements pertaining to an agency's transfer or discharge of a client.
§97.296(a)	Adoption of a written policy that states whether physician delegation will be honored by the agency.
§97.298	Adoption of a written policy for ensuring compliance with rules adopted by the Texas Board of Nursing in 22 TAC Chapter 224 (Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments) and 22 TAC Chapter 225 (RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).
§97.299	Adoption of a written policy for ensuring compliance with rules of the Texas Board of Nursing adopted at 22 TAC Chapters 211-226 (Nursing Continuing Education, Licensure, and Practice in the State of Texas).
§97.300(b)	Adoption of a written policy for maintaining a current medication list and a current medication administration record.
§97.301(a)(1)-(9)(A)-(P) separate penalties	Requirements for maintaining an agency's client records.
§97.301(b)(1)-(3) separate penalties	Adoption of a written policy for retention of records.
§97.302	Adoption of a written policy for pronouncement of death if that function is carried out by an agency registered nurse.
§97.303(1), (2)(A)-(B), (3)(A)-(G) separate penalties	Standards for possession of sterile water or saline, certain vaccines or tuberculin, and certain dangerous drugs.
§97.321(a)	Branch office compliance with the regulations of its parent agency.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.321(c)(1)	Providing services only within a branch office licensed service area.
§97.321(c)(3)(A)-(B) separate penalties	Providing a written notification of an expansion of a branch office service area.
§97.321(c)(4)	Providing written notification of a reduction of a branch office licensed service area.
§97.321(d)(1)-(3) separate penalties	Requirements for branch offices.
§97.321(f)	Requirement prohibiting branch offices from providing services not offered by the parent agency.
§97.322(a)	Alternate delivery site compliance with hospice services standards.
§97.322(b)	An alternate delivery site's independent compliance with §97.403(c), (f)(1), (i), and §97.301.
§97.322(c)(1)	Providing services only within an alternate delivery site licensed service area.
§97.322(c)(3)(A)-(B) separate penalties	Providing a written notification of an expansion of an alternate delivery site service area.
§97.322(c)(4)	Providing written notification of a reduction of an alternate delivery site licensed service area.
§97.322(d)	Requirements for hospices and alternate delivery sites.
§97.401(f)	The use of home health aides.
§97.402(b) separate penalties	Requirement for implementing a home health aide training and competency program.
§97.403(b)	Restriction on use of the word "hospice" in a title or description of a facility, organization, program, service provider, or services without a license.
§97.403(f)(4)	Retaining responsibility for payment for services.
§97.403(j)	Requirement that reassessment of a client must not reduce core services.
§97.403(k)	Informing the client of the availability of short-term inpatient care.
§97.403(l)	Making and documenting efforts to arrange for visits of clergy and other members of spiritual and religious organizations.
§97.403(w)(2)(A)-(G) separate penalties	Development and documentation of a written emergency preparedness and response plan for a freestanding hospice in the event of a disaster.
§97.403(u)(4)	Specifying the persons authorized to administer medications in the client's plan of care.
§97.403(w)(5)-(6), and (8) separate penalties	Physical plant requirements in a freestanding hospice that provides inpatient care.
§97.403(w)(11)(A)-(D) separate penalties	Providing and supervising meal service in a freestanding hospice that provides inpatient care.
§97.404(e)	Requirement that an agency develops operational policies that are considerate of the principles of individual and family choice and control, functional need, and accessible and flexible services.
§97.404(f)(1)-(3) separate penalties	Additional requirements for maintaining client records in an agency that provides personal assistance services.

SEVERITY LEVEL A VIOLATIONS $100 - $250 per violation	
Rule Cite	**Subject Matter**
§97.404(g)	Adoption of a written policy that addresses the supervision of agency personnel with input from the client or family on the frequency of supervision.
§97.404(g)(1)-(2)	Conditions and qualifications for supervision of agency personnel delivering personal assistance services.
§97.405(d)(1)-(2) separate penalties	Requirement for individual personnel files on all physicians.
§97.405(g)	A written transfer agreement with a local hospital for an agency that provides home dialysis services.
§97.405(h)	An agreement with a licensed end stage renal disease facility to provide backup outpatient dialysis services.
§97.405(j)	Ensuring that names of clients awaiting a donor transplant are entered in the recipient registry program.
§97.405(s)(1)-(7) separate penalties	Additional requirements for maintaining client records in an agency that provides home dialysis services.
§97.405(v)(1)-(2) separate penalties	Development of a written preventive maintenance program for home dialysis equipment.
§97.405(z)(1)-(7) separate penalties	Adoption of policies and procedures for medical emergencies and emergencies resulting from a disaster, and required of an agency that provides home dialysis services.
§97.406(1)	Adoption of a written policy for the provision of psychoactive treatments, if applicable.
§97.521(a)	Requirement for initiation of services for receiving an initial license.
§97.523(a)	Staff availability for the initial survey.
§97.523(b)	Staff availability for survey other than the initial survey.
§97.523(e)	Providing surveyor entry to the agency during regular business hours and within two hours of the surveyor's arrival at the agency.
§97.525(a)(2)	Availability of agency records.
§97.525(c)	Providing surveyor access to agency records.
§97.525(f)	Providing copies of agency records.
§97.527(b) separate penalties	Providing surveyor with audio recording of the exit conference if made by the agency.
§97.527(c) separate penalties	Providing surveyor with video recording of the exit conference if made by the agency.
§97.527(g)(1)	Time frame for submitting a plan of correction.
§97.527(g)(2)(A)-(D) separate penalties	Time frame for correcting a violation.
§97.527(g)(4)(A)	Time frame for submitting a revised plan of correction.

Figure: 40 TAC §97.602(e)(2)

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.220(b)	Maintaining adequate staff to provide services and supervise the provision of services within the service area.
§97.241(a), (c), (d) separate penalties	Management responsibilities.
§97.243(a)(1)	Designating a qualified agency administrator.
§97.243(a)(2)	Designating a qualified agency alternate administrator.
§97.243(b)(1)-(2) separate penalties	Responsibilities of an agency administrator.
§97.243(c)(1)	Requirement to directly employ or contract with a qualified individual to serve as the supervising nurse.
§97.243(c)(2)	Requirement to designate a qualified alternate supervising nurse.
§97.243(c)(2)(A)(i)-(iv) separate penalties	Supervisory responsibilities of the supervising nurse or alternate supervising nurse.
§97.243(c)(2)(B)	Allowing the supervising nurse to be the administrator if the supervising nurse meets the qualifications of the administrator.
§97.243(c)(3)	Requirements for the supervision of physical, occupational, speech, or respiratory therapy; medical social services; or nutritional counseling.
§97.243(d)(1)-(2) separate penalties	Adoption of a written policy for the supervision of branch offices or alternate delivery sites, if established.
§97.244(a)(1)-(2) separate penalties	Qualifications of the agency administrator and alternate administrator.
§97.244(b)(1)-(5) separate penalties	Conditions of the agency administrator and alternate administrator.
§97.244(c)(1)-(2) separate penalties	Qualifications of the supervising nurse and alternate supervising nurse.
§97.247(a)-(c) separate penalties	Verification of employability for unlicensed persons (criminal history checks, nurse aide registry, and employee misconduct registry).
§97.249(c)	Reporting alleged acts of abuse, neglect, and exploitation of clients.
§97.250(b) and (c)(1)-(3) separate penalties	Enforcement of an agency's written policy for investigation of known and alleged acts of abuse, neglect, and exploitation and other complaints.
§97.251	Compliance with the agency's written policy to ensure that all professional disciplines comply with their respective professional practice acts or title acts for reporting and peer review.
§97.252(1)-(2)	An agency's financial ability to carry out its functions.
§97.256(1)(A)-(M), (2), (4)(A)-(C), and (5)(A)-(B) separate penalties	Maintaining and implementing a written emergency preparedness and response plan.
§97.259(b)-(e) separate penalties	Initial educational training requirements for a first-time agency administrator and alternate administrator.
§97.260(a)	Annual continuing education requirements for an agency administrator and alternate administrator.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.260(b)	Continuing education requirements for an agency administrator and alternate administrator who has not served for 180 days or more immediately preceding the date of designation.
§97.281	Enforcement of a written policy for client care practices.
§97.282	Compliance with an agency policy on client conduct and responsibility and client rights.
§97.283(a)(2)	Requirement for providing a written notice of the agency's policy on advance directives.
§97.284	Compliance with the Clinical Laboratory Improvement Amendments of 1988.
§97.285(1)(A)-(C), (2) separate penalties	Enforcement and compliance with the agency's written policies on infection control.
§97.286(b)	Compliance with 25 TAC §§1.131-1.137 concerning the Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities.
§97.287(a)(1)-(3), (b), (c) separate penalties	An agency's Quality Assessment and Performance Improvement Program.
§97.288(a)-(b) separate penalties	Compliance with an agency's written policy for coordination of services and documentation requirements.
§97.289(a)-(b) separate penalties	An agency's use of and agreement with independent contractors and arranged services.
§97.290(a)	Ensuring that backup services are available when needed.
§97.290(b)	Ensuring that clients are educated in how to access care after hours.
§97.292(a)(1)-(7)-(b) separate penalties	Providing a client or a client's family with a written agreement for services, ensuring appropriate content of the agreement, obtaining an acknowledgement of receipt, and ensuring that the acknowledgement is in the client's record.
§97.295(a)(1)-(2) separate penalties	Providing a client with written notification, and notifying a client's attending physician if applicable, of transfer or discharge.
§97.295(b)	An agency providing written notification of a client's transfer or discharge within the required time frame.
§97.296(a)-(b)(1)-(6) separate penalties	Enforcement of an agency's policy regarding acceptance of physician delegation orders.
§97.297(1)-(2)(A)-(B) separate penalties	Adoption and enforcement of a written policy describing protocols and procedures agency staff must follow when receiving physician orders, if applicable.
§97.298	Enforcement of a written policy for ensuring compliance with the rules adopted by the Texas Board of Nursing in 22 TAC Chapter 224 (Delegation of Nursing Tasks by Registered Professional Nurses to Unlicensed Personnel for Clients with Acute Conditions or in Acute Care Environments) and 22 TAC Chapter 225 (RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions).
§97.300(b)	The administration of medication.
§97.303	The possession of sterile water or saline, certain vaccines or tuberculin, and certain dangerous drugs.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.321(c)(2)	Maintaining adequate staff to provide and supervise services at a branch office.
§97.322(c)(2)	Maintaining adequate staff to provide and supervise services at an alternate delivery site.
§97.401(b)	Acceptance of a client for home health services and the initiation of services.
§97.401(d)	Requirement that qualified personnel provide and supervise all services.
§97.401(e)	Requirement that all staff providing services, delegation, and supervision be employed by or be under contract with the agency.
§97.401(g)	Age and competency of unlicensed persons providing licensed home health services.
§97.402(a)	Compliance with the Medicare Conditions of Participation (Social Security Act, Title 42, Code of Federal Regulations, Part 484.)
§97.402(c)	Compliance with §97.701(f) of this chapter (relating to Home Health Aides) for an agency that implements a competency evaluation program.
§97.403(a)	Compliance with the Social Security Act and the regulations in Title 42, Code of Federal Regulations, Part 418.
§97.403(c)(1)-(8) separate penalties	Adoption of a written policy for the provision of hospice services.
§97.403(d)(1)-(3) separate penalties	Requirement and conditions of the medical director for an agency that provides hospice services.
§97.403(e)(1)(A)-(D) separate penalties	Composition of an interdisciplinary team or teams.
§97.403(e)(2)(A)-(D) separate penalties	Responsibilities of the interdisciplinary team.
§97.403(e)(4)	Designating a registered nurse to coordinate implementation of the plan of care for each client.
§97.403(f)(1)	Ensuring continuity of client and family care in home and outpatient and inpatient settings.
§97.403(f)(2)(A)-(F) separate penalties	Contract requirements for providing arranged services.
§97.403(f)(3)	Professional management responsibility for arranged services.
§97.403(f)(5)(A)-(E) separate penalties	Ensuring that inpatient care is furnished only in a licensed facility and according to contract requirements.
§97.403(g)(1)-(3) separate penalties	Time requirements for contacting the client or client's representative, performing the initial health assessment visit, and initiation of services.
§97.403(h)	Performing and making available to each client a comprehensive health assessment that identifies the client's needs.
§97.403(h)(1)	Completing the comprehensive health assessment in a timely manner.
§97.403(h)(2)(A)-(C) separate penalties	Composition of the comprehensive health assessment.
§97.403(h)(3)(A)-(B) separate penalties	Requirement for updating and revising the comprehensive health assessment.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.403(i)(1)-(3)(A)-(G) and (4) separate penalties	Requirements for a written plan of care.
§97.403(m)	Ensuring that all core services are provided, and requirements for using contracted staff, if necessary.
§97.403(n)(1)-(3) separate penalties	Requirements for providing nursing care and services.
§97.403(o)	Qualifications of the social worker performing hospice services.
§97.403(p)	Requirements for ensuring that general medical needs of clients are met.
§97.403(q)(1)-(4) separate penalties	Requirements for providing counseling services.
§97.403(r)	Requirements for providing services, maintaining a system for ensuring identification of client needs, communication across all disciplines, and integration of services.
§97.403(s)	Requirements for having therapy services available.
§97.403(t)	Requirements for having home health aide and homemaker services available.
§97.403(t)(1)-(2) separate penalties	Requirements for RN supervisory visits to assess aide services.
§97.403(u)(1)-(3)(A)-(D) separate penalties	Requirements for providing medical supplies, appliances, and medications, as needed, for palliation and management of terminal illness and related conditions.
§97.403(v)	Requirements that inpatient care be available for pain control, symptom management, and respite.
§97.403(w)(1)(A)-(B) separate penalties	Requirements for having on-site 24-hour nursing services provided by RNs and LVNs.
§97.403(w)(2)(A)-(G) separate penalties	Implementation of a written disaster preparedness and response plan for a freestanding hospice in the event of a disaster.
§97.403(w)(3)	Meeting all federal, state, and local laws, regulations, and codes pertaining to health and safety.
§97.403(w)(4)(A)-(B) separate penalties	Meeting the National Fire Protection Association Life Safety Code for fire in buildings and structures.
§97.403(w)(9)	Having available at all times a quantity of linen essential for proper care of clients and requirements to prevent the spread of infection on linens.
§97.403(w)(10)	Making provisions for isolating clients with infectious diseases.
§97.403(w)(12)(A)-(I) separate penalties	Methods and procedures for dispensing and administering medications.
§97.404(c)	Qualifications of agency staff performing personal assistance services.
§97.404(d)(1)-(4)	Tasks authorized under a personal assistance services license category.
§97.404(h)	Performance of gastrostomy tube feedings and medication administration for an agency that provides personal assistance services.
§97.405(a)	Requirements for agencies that provide peritoneal dialysis or hemodialysis services.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.405(c)(1)-(2) separate penalties	Qualifications and responsibilities of the medical director for an agency that provides home dialysis services.
§97.405(e)(1)(A)-(C) separate penalties	Provision and supervision of nursing services for an agency that provides home dialysis services.
§97.405(e)(2)	Provision of nutritional counseling for an agency that provides home dialysis services.
§97.405(e)(3)	Provision of medical social services for an agency that provides home dialysis services.
§97.405(f)(1)(A)-(R)(i)-(iv) separate penalties	Requirements for orientation and training of personnel providing direct care to clients receiving home dialysis services.
§97.405(f)(2)(a)-(G) separate penalties	Requirement for an orientation and skills education period for licensed nurses.
§97.405(i)	Requirement that an agency coordinate the exchange of medical and other important information when transferring a home dialysis client to a health-care facility for treatment.
§97.405(k)	Requirement for routine hepatitis testing of home dialysis clients and agency employees providing dialysis care.
§97.405(k)(1)(A)-(C) separate penalties	Requirements for hepatitis B screening and vaccinations for staff.
§97.405(k)(2)(A)-(E) separate penalties	Requirements for hepatitis B screening and vaccinations for clients.
§97.405(l)	Requirements for employees providing direct care to clients to have a current CPR certification.
§97.405(m)	Requirement for initial admission assessment of a client for home dialysis services.
§97.405(n)	Requirement for development of a long-term program for a client receiving home dialysis services.
§97.405(o)	Requirement that the agency conducts a history and physical of a home dialysis client at admission and annually.
§97.405(p)(1)-(2) separate penalties	Requirement for physician orders for home self-assisted dialysis treatment.
§97.405(q)(1)-(7) separate penalties	Requirements for development and implementation of a care plan for a home dialysis client.
§97.405(r)	Requirement for medication administration by licensed personnel for an agency that provides home dialysis services.
§97.405(t)(1)-(4) separate penalties	Requirements for use of water in the home dialysis setting.
§97.405(v)(1)(A)-(D)-(2) separate penalties	Requirement for a written preventive maintenance program for home dialysis equipment.
§97.405(w)(1)-(6) separate penalties	Reuse of disposable medical devices in the home dialysis setting.
§97.405(x)(1)-(4) separate penalties	Provision of laboratory services.
§97.405(y)(1)-(2) separate penalties	Supplies for home dialysis services.

SEVERITY LEVEL B VIOLATIONS $500 - $1,000 per violation	
Rule Cite	**Subject Matter**
§97.405(z)(1)-(7)(A)-(C) separate penalties	Compliance with policies and procedures for medical emergencies and emergencies resulting from a disaster required of an agency that provides home dialysis services.
§97.406(2)-(5) separate penalties	Provision of psychoactive services.
§97.407(1)-(11) separate penalties	Provision of intravenous therapy services.
§97.523(e)	Requirement to grant the surveyor access to the agency.
§97.701(a)-(g) separate penalties	Home health aides.
§95.128(a)-(n) and (q)-(r)	Home health medication aides.
§95.128(o)-(p)	Home health medication aide training program.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Capital Area Rural Transportation System

Public Notice

The Capital Area Rural Transportation System (CARTS) invites qualified companies to submit proposals for the construction of an addition to the CARTS Headquarters facility located at 2010 E. 6th St., Austin, Texas 78702-6050.

RFP and Construction Documents will be available at the above address beginning at 2:00 p.m. October 2, 2007. A $100.00 refundable deposit will be required for each set. A non-mandatory pre-proposal meeting will be held at the same address at 2:00 p.m. October 16.

The schedule is:

Tuesday, October 2, 2:00 p.m. - RFP Documents/CDs ready to be picked up by contractors.

Tuesday, October 16, 2:00 p.m. - Pre-Proposal Conference at CARTS.

Tuesday, October 23, 2:00 p.m. - Deadline for Proposal Questions.

Monday, October 29 - Responses Distributed via electronic-mail only.

Tuesday, November 6, 2:00 p.m. - Proposals Due at CARTS.

Proposals will be evaluated on cost, qualifications, and the quality of submittal.

TRD-200704681
Dave Marsh
General Manager
Capital Area Rural Transportation System
Filed: October 4, 2007

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Coastal Coordination Council

Notice and Opportunity to Comment on Requests for Consistency Agreement/Concurrence Under the Texas Coastal Management Program

On January 10, 1997, the State of Texas received federal approval of the Coastal Management Program (CMP) (62 Federal Register pp. 1439-1440). Under federal law, federal agency activities and actions affecting the Texas coastal zone must be consistent with the CMP goals and policies identified in 31 TAC Chapter 501. Requests for federal consistency review were deemed administratively complete for the following project(s) during the period of September 28, 2007, through October 4, 2007. As required by federal law, the public is given an opportunity to comment on the consistency of proposed activities in the coastal zone undertaken or authorized by federal agencies. Pursuant to 31 TAC §§506.25, 506.32, and 506.41, the public comment period for this activity extends 30 days from the date published on the Coastal Coordination Council web site. The notice was published on the web site on October 10, 2007. The public comment period for this project will close at 5:00 p.m. on November 9, 2007.

FEDERAL AGENCY ACTIONS:

Applicant: Park Board of Trustees for the City of Galveston; Location: The borrow site to be added is adjacent to the South Jetty, just off of the East end of Galveston Island, in Galveston County, Texas. The borrow site can be located on the U.S.G.S. quadrangle map entitled: Galveston, Texas. Approximate Latitude/Longitude Coordinates in NAD 83(meters): Lat: 29.3373 degrees N, Long: 94.7161 degrees W. Project Description: The applicant proposes to amend their existing beach nourishment permit by adding an alternate offshore borrow source area and expanding the current beach nourishment boundaries to include the entire shoreline on West Galveston Island excluding the Galveston Island State Park. CCC Project No.: 07-0294-F1; Type of Application: U.S.A.C.E. permit application #SWG-2007-1025 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Applicant: St. Mary Land and Exploration Company; Location: The project is located approximately 1 mile north of Port Bolivar in State Tract (ST) 236, Galveston East Bay, in Galveston County, Texas. The project can be located on the U.S.G.S. quadrangle map entitled: Port Bolivar, Texas. Approximate UTM Coordinates in NAD 27 (meters): Beginning of Pipeline Bore - Zone 15; Easting: 328534; Northing: 3258822. End of Pipeline at Well#1 - Zone 15; Easting: 327304; Northing: 3251100. Project Description: The applicant proposes to install, operate and maintain a pipeline up to 8 inches in diameter from a point on Goat Island within ST 342. The pipeline would be bored from a point on Goat Island for a distance of 3,324 feet. The remainder of the pipeline would be installed by jetting or trenching through STs 342, 341, 340, 321, 320, 319, 276, 274, 237, an ending in ST 236 at Well No. 1. CCC Project No.: 08-0003-F1; Type of Application: U.S.A.C.E. permit application #SWG-2007-766 is being evaluated under §10 of the Rivers and Harbors Act of 1899 (33 U.S.C.A. §403) and §404 of the Clean Water Act (33 U.S.C.A. §1344). Note: The consistency review for this project may be conducted by the Texas Commission on Environmental Quality under §401 of the Clean Water Act (33 U.S.C.A. §1344).

Pursuant to §306(d)(14) of the Coastal Zone Management Act of 1972 (16 U.S.C.A. §§1451 - 1464), as amended, interested parties are invited to submit comments on whether a proposed action is or is not consistent with the Texas Coastal Management Program goals and policies and whether the action should be referred to the Coastal Coordination Council for review.

Further information on the applications listed above may be obtained from Ms. Tammy Brooks, Consistency Review Coordinator, Coastal Coordination Council, P.O. Box 12873, Austin, Texas 78711-2873, or tammy.brooks@glo.state.tx.us. Comments should be sent to Ms. Brooks at the above address or by fax at (512) 475-0680.

TRD-200704794
Larry L. Laine
Chief Clerk/Deputy Land Commissioner, General Land Office
Coastal Coordination Council
Filed: October 9, 2007

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Comptroller of Public Accounts

Notice of Award

Pursuant to Chapter 2254, Subchapter B, Chapter 403, and Chapter 2305, Texas Government Code, the State Energy Conservation Office (SECO) of the Comptroller of Public Accounts (Comptroller) announces this notice of consulting contract award in connection with the Request for Proposals (RFP #180a) for technical assistance and consulting services to assist the Comptroller with the preparation of a written, comprehensive update to the Texas Renewable Energy Resource Assessment - Survey, Overview and Recommendations, and related services.

Comptroller announces that a contract was awarded to Virtus Energy Research Associates, Inc., 906 1/2 Congress Avenue, Austin, Texas 78701. The total amount of the contract is not to exceed $249,993.00. The term of the contract is September 27, 2007 to May 31, 2009. The report update is due on or before September 27, 2008.

The notice of request for proposals (RFP #180a) was published in the August 3, 2007, issue of the *Texas Register* (32 TexReg 4793).

TRD-200704678
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: October 4, 2007

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Notice of Contract Amendment

The Comptroller of Public Accounts (Comptroller) announces the amendment and renewal of the professional accounting services contract with McConnell & Jones, LLP, 3040 Post Oak Blvd., Suite 1600, Houston, Texas 77056. The contractor provides professional accounting services to the Texas Prepaid Higher Education Tuition Board.

The term of the original contract was July 19, 2006 through August 31, 2007. This renewal extends the term of the contract from September 1, 2007 through August 31, 2008.

The total amount of the contract as renewed is estimated to be $75,000.00.

The notice of request for proposals (RFP 175L) was originally published in the March 3, 2006, issue of the *Texas Register* (31 TexReg 1496). The notice of award was published in the August 11, 2006, issue of the *Texas Register* (31 TexReg 6395).

TRD-200704679
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: October 4, 2007

♦ ♦ ♦

Notice of Issuance

Request for Qualifications for Independent Examining Services for the Texas Comptroller of Public Accounts, #177d

Request for Qualifications: Pursuant to Senate Bill 1458, 77th Texas Legislature codified in Subchapter A, Chapter 111, §111.0045, Texas Tax Code, the Comptroller of Public Accounts (the Comptroller) issues this Request for Qualifications (RFQ #177d) from qualified independent persons or firms to perform certain services. As a clarification, as used in this RFQ #177d and the Comptroller's rules codified at 34 TAC §3.3, the services under any contracts resulting from this RFQ mean Hotel Occupancy Tax compliance examination services; such services do not include any attestation services or rendition of an opinion of any nature by any such contractors.

The Comptroller issued this RFQ #177d by posting it on the Electronic State Business Daily on October 19, 2007, and, by publishing this RFQ #177d in the October 19, 2007, issue of the *Texas Register*. The Comptroller solicits a Statement of Qualifications pursuant to Chapter 2254, Subchapter A, of the Texas Government Code from persons or firms that are interested in contracting with the Comptroller to perform Hotel Occupancy Tax examinations that meet the requirements of Section 111.0045, Texas Tax Code, administrative rules adopted and procedures established by the Comptroller under that statute, and other applicable law. The Comptroller has adopted a rule governing contract examiners as codified at 34 TAC §3.3. Under this RFQ, the Comptroller reserves the right to select and contract with one or more persons or firms to conduct these examinations on an as-needed basis. No minimum amount of examinations or compensation is guaranteed to any selected contractor.

The Comptroller solicits Statements of Qualifications in response to this RFQ from existing contract examiners as well as qualified persons or firms not currently or previously under contract with the Comptroller. All respondents, including contract examiners selected under previous RFQs must attend Mandatory Orientation conducted by the Comptroller prior to receipt of any examination packages under any contract awarded under this RFQ. The contract term shall end August 31, 2008 with (2) two renewal options of (1) one year each exercised (1) one year at a time.

By this contract examination program, the Comptroller intends to increase the number of examinations of taxpayers. The Comptroller has implemented a program to contract with interested persons and firms that meet the following minimum qualifications and other reasonable qualifications established by the Comptroller consistent with Section 111.0045, Texas Tax Code the Comptroller's administrative rules and procedures and other applicable law.

The Comptroller will accept Statements of Qualifications in response to this RFQ from firms and individuals that have the following minimum qualifications:

(i) a bachelor's degree from an accredited senior college or university with a minimum of twenty-four (24) hours of accounting, including six (6) hours of intermediate accounting and three hours of auditing; and

(ii) one (1) year of experience in Texas tax auditing, accounting, or other Texas tax services.

For state fiscal year 2008 beginning September 1, 2007, the Comptroller will select, in its sole discretion, those qualified contract examiners to perform Hotel Sales Tax examinations on an as-needed and as-assigned basis that the Comptroller identifies as appropriate for inclusion in such contracts. At the time of assignment, the Comptroller will provide selected contract examiners with a preliminary examination package containing the identity and requisite information for each taxpayer that will be examined under the contract. The contracts will provide for one or more awards of not to exceed $180,000 firm fixed price payment to the examiner upon successful completion of the assigned examinations (final examination package) and the Comptroller's written acceptance of the examination report and other contract deliverables, including workpapers. Awards shall be based on the qualifications of the examiners proposed in the Statement of Qualifications submitted. Individual examiners submitting Statements of Qualification who have no other examiner employees shall be considered, in the Comptroller's sole discretion, for one (1) $60,000 award and individual examiners

with at least one (1) employee examiner. Firms in the form of any business entity that may lawfully perform examinations and which have two (2) or more examiners may be considered, in the Comptroller's sole discretion, for multiple awards per firm of $60,000 not to exceed $180,000 per fiscal year during the Contract term. Barring unforeseen circumstances only one (1) round of awards will be made at the beginning of the one (1) year initial contract term; however, the Comptroller reserves the right, in its sole discretion, to make additional awards during the one (1) year initial contract term. The Comptroller reserves the right, in its sole discretion, to reallocate, after their initial assignment, examination packages among contract examiners based on the Contractor's substantial performance or non-performance under the Contract terms so as to increase or decrease the number of examinations assigned to a particular contract examiner. Payment will be made in accordance with the terms of the Contract. Each Contract will require the examiner to perform and complete the examinations, including the examination reports, for a group of taxpayers that, based on historical examination completion data, should require about 1280 person hours of work for each $60,000 amount to complete at the rate of $46.88 per hour. Examiners will be paid for assigned work completed to date in $10,000 increments (except the last payment, if applicable) upon completion of a set number of the examinations assigned as determined by the Comptroller and, upon submission to and acceptance by the Comptroller as provided in the Agreement.

In performing assigned examinations and for the contracted lump sum payments, selected contract examiners will complete all work necessary to identify the correct amount of tax that should have been reported by each taxpayer and provide the Comptroller with the data and other information necessary to support any assessment of tax or refund of tax that results from the examination report. Selected contract examiners will also provide any time reports and other written documentation required by the Comptroller. The Comptroller will not make any payments in advance.

Under this RFQ, the maximum contract amount paid to any individual examiner without additional examiner employees, an individual examiner with additional examiner employees or a firm with multiple examiners will not exceed $180,000.00 for the FY 2008.

Selected contract examiners must complete all work and submit all examination reports, workpapers and other deliverables no later than required under the terms of the proposed Agreement.

Selected contract examiners must meet professional conflict of interest standards and other standards established by the Comptroller to ensure the independence of each assigned examination.

Regarding prior employment with the Comptroller, the following provisions shall apply in determining eligibility for contract awards, if any, resulting from this RFQ:

Section 2252.901, Texas Government Code reads as follows: "(a) A state agency may not enter into an employment contract, a professional services contract under Chapter 2254, or a consulting services contract under Chapter 2254 with a former or retired employee of the agency before the first anniversary of the last date on which the individual was employed by the agency, if appropriated money will be used to make payments under the Agreement. This section does not prohibit an agency from entering into a professional services contract with a corporation, firm, or other business entity that employs a former or retired employee of the agency within one year of the employee's leaving the agency, provided that the former or retired employee does not perform services on projects for the corporation, firm, or other business entity that the employee worked on while employed by the agency."

It is the Comptroller's policy that an individual employed by the Comptroller during the last twelve (12) months may not provide services under the Contract as individual or employee of Contractor or another Contractor and may not receive any compensation under the Contract. The twelve (12) month period is measured from the date of separation from Comptroller employment until the date responses to this RFQ are due as stated on Page 4 of the RFQ.

Section 572.054, Texas Govt Code, reads in pertinent part as follows: "(b) A former state officer or employee of a regulatory agency who ceases service or employment with that agency on or after January 1, 1992, may not represent any person or receive compensation for services rendered on behalf of any person regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer's or employee's official responsibility. (c) Subsection (b) applies only to: (1) a state officer of a regulatory agency; or (2) a state employee of a regulatory agency who is compensated, as of the last date of state employment, at or above the amount prescribed by the General Appropriations Act for step 1, salary group 17, of the position classification salary schedule, including an employee who is exempt from the state's position classification plan."

This Section 572.054(b) prohibition against working on matters that the former employee participated in while employed by the Comptroller applies without limitation to any such past actions by the employee even if longer than twelve (12) months, if the employee's compensation exceeded $33,000 annually while employed by the Comptroller at any time during that employee's employment with the Comptroller. Again, it is the Comptroller's policy interpretation that "matter" includes specific examinations of taxpayers.

Time is of the essence in implementation of this program. Respondents to this RFQ must be available to begin accepting assignments no later than January 2, 2008 upon completion of orientation or other timelines established by the Comptroller for such implementation. The Comptroller anticipates awarding multiple master Agreements as a result of this RFQ and will not entertain negotiation of the basic terms and conditions. All respondents will be offered the same master contract terms and conditions. Respondents should not respond to this RFQ if they cannot agree to the terms and conditions of the sample Agreement. Any resulting Agreements are non-exclusive and the Comptroller may issue additional solicitations for the contracted services at any time. The Comptroller is not obligated to assign any examinations to recipients of master contract awards.

Questions; Proposed Contract: Questions concerning this RFQ must be in writing and submitted via hand delivery, facsimile, or E-mail no later than November 2, 2007, 2:00 pm, Central Zone Time (CZT) to Thomas H. Hill, Assistant General Counsel, Contracts, General Counsel Division, Comptroller of Public Accounts, 111 E. 17th St., ROOM G-24, Austin, Texas, 78774, telephone number: (512) 305-8673, facsimile (512) 475-0973, (512) 463-3669 or E-mail at contracts@cpa.state.tx.us. The Comptroller's official response to questions received by this deadline will be posted as an addendum to the Electronic State Business Daily notice as soon as possible after receipt; the Comptroller expects to post these official responses no later than November 9, 2007 or as soon thereafter as practicable. Respondents should note that the Official Response to Questions may contain information modifying the terms and conditions of the RFQ, revising or amending the RFQ and/or other documents attached to the RFQ. For these reasons, respond.

Closing Date: An original with original ink signatures on each document within the Statement of Qualifications requiring signatures and ten (10) hard copies of each Statement of Qualifications clearly marked as copies must be overnighted or hand delivered to and received in the Office of the Assistant General Counsel, Contracts, at the address spec-

ified above no later than 2:00 p.m. (CZT), on Monday November 19, 2007. Statements of Qualifications received after this time and date will not be considered. No Statements of Qualification will be accepted in any other format or media other than hard copy. Respondents shall be solely responsible for confirming the timely receipt of Statements of Qualifications.

Content: Statements of Qualifications must include all of the following information in order to be considered:

1. Checklist in format of Exhibit G to this RFQ as posted on the addenda to the Electronic State Business Daily notice of issuance of this RFQ;

2. Transmittal letter that (a) describes specific experience and qualifications of both the firm and each individual in the conduct of state tax examinations; and (b) outlines the respondent's understanding of §111.0045, Texas Tax Code, other relevant provisions of the Texas Tax Code and other related enabling legislation related to conduct of these examinations on an as needed basis;

3. Respondent Identifying Information. The respondent must provide the following identifying information: a. name and address of the individual or business entity submitting the proposal; b. names of all principals; c. type of business entity (i.e. sole proprietorship, corporation, partnership, limited liability company, etc); d. state of incorporation or organization and principal place of business (attach copies of articles or other certificates showing official approval by the pertinent governmental entity); e. name and location of each local examination facility that relates to the respondent's performance under this RFQ; f. name, address, business and home telephone number, fax number, cell phone number, and e-mail address of the respondent's principal contact person regarding the Contract; g. the respondent's Federal Employer Identification Number and Texas Tax Identification/Registration Number, if any; h. full name and address, telephone number, fax number, cell phone number and e-mail address for each shareholder, member, partner, and employee of the respondent who will perform services on the Contract; i. detail any firm ownership changes which have occurred in the last three years. Are any changes pending? j. detail any joint ventures or affiliations.

4. Respondent Questionnaire Exhibit A to the RFQ for each individual who will be involved in the project. The Respondent Questionnaire must be on the form contained on the addenda to the Electronic State Business Daily notice of issuance of this RFQ. This response to the RFQ must disclose all personnel who will perform professional services under the terms of the Master Agreement. Respondent understands only those persons disclosed by the Respondent Questionnaire will be admitted to the required orientation classes. This provision will be strictly enforced. All information on the Respondent Questionnaire form must be fully filled out and complete in all respects. Evaluation of respondents will be based in part on the information on this form and it is vitally important that the information be fully complete and accurate. Failure to submit a complete, separate, and signed Respondent Questionnaire detailing all courses, dates, and subject of courses by each person who applies to perform examination services may result in disqualification of the Statement of Qualifications;

5. A sample Examination Plan providing a list of the examination procedures and resources that will be utilized to conduct these examinations on an as needed basis if selected by the Comptroller. The Examination plan should list or describe the actual procedures to be used in sufficient detail so as to demonstrate an understanding of internal control, record keeping, and taxpayer reporting responsibilities for sales tax and the appropriate examination procedures necessary for verification of correct amounts of tax. The sample Examination Plan must include all items contained in the General Audit Checklist section of the Comptroller's Auditing Fundamentals Manual, Chapter 3, and all items contained in the Comptroller's Audit Plan for Hotel Occupancy Tax. The sample examination plan should include all necessary procedures and instructions for completing those procedures in sufficient detail to allow any person who meets the one year experience requirement in 34 TAC §3.3 to properly perform a Hotel Occupancy tax examination with minimal supervision. If portions of any Comptroller publication, manual, or other document are used to prepare the examination plan or incorporated into the plan, the most current version must be used. The Comptroller's audit manuals may be found at the following internet location: http://www.window.state.tx.us/taxinfo/audit/auditman.htm.

Also see the Comptroller's Auditing Fundamentals Manual, Chapter 3 and 4 at http://www.window.state.tx.us/taxinfo/audit/auditfun/3aplan.htm and http://www.window.state. tx.us/taxinfo/audit/auditfun/4entranc.htm, respectively.

The Comptroller's Hotel Occupancy Tax Audit Manual may be found at: http://window.state.tx.us/taxinfo/audit/hotel /index.htm.

6. Proposed sample Workplan (including Timeline, Tasks and Deliverables) to implement each of the examinations after assignment, including (a) methods for deploying personnel and equipment to perform the examinations timely and otherwise in accordance with each contractual requirement; (b) methods for making personnel available for orientation and examination; (c) date availability for each of the personnel to perform assigned examinations; (d) methods for conducting preliminary (prior to receipt of taxpayer questionnaire) and final (after receipt of taxpayer questionnaire) conflicts checks regarding actual or potential conflicts of interest and notifying the Comptroller prior to accepting or beginning an assignment, (e) an estimate of the number of examinations that would be completed in the 1280 hours of work estimated to be required for a $60,000 package of examinations; and (f) an understanding of the Audit Flowchart Timelines contained in the appendix of the Comptroller's Audit Fundamentals Manual;

7. Statement of whether or not the respondent is a Historically Underutilized Business (HUB) and its efforts and willingness of the respondent to comply with the HUB requirements of Texas law and administrative rules and regulations. In order to be a Historically Underutilized Business, a respondent must be registered as such with the Texas Building and Procurement Commission according to its rules and regulations concerning the same. You may check their website at www.tbpc.state.tx.us and choose Historically Underutilized Businesses or call the Comptroller's HUB Coordinator, Hilda Galaviz at (512) 463-3911;

8. Confirmation of understanding of and willingness to comply with the policies, directives, rules, procedures and guidelines of the Comptroller and other Standards of Performance established by the Comptroller for the conduct of the assigned examinations;

9. Confirmation of understanding of and willingness to adhere to all provisions of the sample Agreement, including, without limitation, the proposed fee arrangements, as posted on the addenda to the Electronic State Business Daily notice of issuance of this RFQ;

10. Completed, initialed where applicable, and signed Execution of Statement of Qualifications Form on Exhibit B as posted on the addenda to the Electronic State Business Daily notice of issuance of this RFQ;

11. Completed and signed Nondisclosure Agreement on the form set out on Exhibit D to this RFQ as posted on the addenda to the Electronic State Business Daily notice of issuance of this RFQ;

12. Signed letter or letters from a qualified insurance agent or agents containing quotations for ALL OF the required insurance coverages set out in Section VIII of the Agreement for Professional Services and stat-

ing that the coverages are available to the respondent upon selection, if any, of the contract examiner pursuant to this RFQ. In the alternative, respondents may submit current certificates of insurance showing the required coverage is already in force and in effect. Failure to provide information on EACH of the required coverages may result in disqualification of the Respondent's Statement of Qualifications. Respondent's insurance agents shall be ready to immediately issue policies and certificates upon notification of the Respondent's selection. Time is of the essence and no Agreements will be executed without the coverage required. A successful Respondent's preliminary selection may be rescinded due to failure to have the required insurance coverage by the time set by the Comptroller;

13. Completed, signed, and initialed where applicable Criminal History Certification on the form set out on Exhibit E to this RFQ as posted on the addenda to the Electronic State Business Daily notice of issuance of this RFQ;

14. Completed and signed Family Code Certification on the form set out on Exhibit F to this RFQ as posted on the addenda to the Electronic State Business Daily notice of issuance of this RFQ;

15. Signed Statement of representation that the respondent and any persons holding equity interests in respondent and all persons listed as examiners in its Statement of Qualifications are neither respondents under any other Statement of Qualifications responding to this RFQ, nor are employed by, contracted with, and do not own any equity or debt interest in any other respondent to this RFQ; and

16. Compliance with any amendments, modifications, or other requirements and changes to the RFQ set out in the Official Response to Questions in connection with this RFQ and posted by the Comptroller on the Electronic State Business Daily prior to the Closing Date for this RFQ. The above 16 items shall be submitted in the respondent's Statement of Qualification as separate and independent numbered sections corresponding to the above items. Failure to properly label and fully respond to each of the 16 items above may result in disqualification of the respondent but the Comptroller reserves the right to waive minor variations in responses in the best interests of the Comptroller and of the State of Texas.

Mandatory Orientation Session: Respondents must attend, at their sole cost and expense, mandatory orientation session to be conducted by the Comptroller in Austin on December 13, 2007 through December 14, 2007 or as soon thereafter as possible. Questions regarding this mandatory session should be submitted prior to the deadline for submission of other written questions on this RFQ.

Evaluation and Award Procedure: All qualifying Statements of Qualifications received by the deadline above will be evaluated based on the evaluation criteria set out on Exhibit H attached to and made a part of this RFQ. The Comptroller will make the final selections in accordance with Chapter 2254, Subchapter A, Texas Government Code in its sole discretion in the best interests of the Comptroller and the State of Texas. Successful Respondents will be notified by e-mail of their preliminary selection prior to the Mandatory Orientation Session. Notice of contract awards will be published in the Electronic State Business Daily and the *Texas Register* as soon as possible after all Agreements, if any, resulting from this Statement of Qualifications, are fully executed. Respondents who do not receive a preliminary selection e-mail notice before the Orientation Session should assume that they were not selected although the official notice of award will be not be published at the time of the Mandatory Orientation Session but will be posted at the time stated in the Summary of Schedule in the last paragraph of this RFQ or as soon as practical thereafter. The Electronic State Business Daily may be accessed online at: http://esbd.tbpc.state.tx.us/.

Protests. Protests regarding this RFQ or actions taken under it shall be governed by the Comptroller's rule located at 34 Texas Administrative Code Section 1.72, Protests of Agency Purchases.

Limitations: The Comptroller reserves the right to accept or reject any or all Statements of Qualifications submitted in response to this RFQ. The Comptroller reserves the further right to evaluate individual examiners employed by a firm or who are employees of a respondent and approve of contract examiners on an individual basis based on the evaluation criteria. The Comptroller is not obligated to execute any contract or contracts or any specific number of contracts as a result of issuing this RFQ. The Comptroller further reserves the right to issue additional RFQs or other solicitations for the contracted or similar services at any time as the Comptroller determines are necessary to ensure an adequate number of examiners for any assigned examination under this program or any similar program. The Comptroller shall pay no costs or any other amounts incurred by any entity in responding to this RFQ. The Comptroller reserves the right to award contracts on the basis of the need to achieve appropriate examination coverage in all geographical areas of the State of Texas and/or nationwide and to evaluate respondents in a manner that will best achieve this need.

Upon written request by the Comptroller after notice of tentative contract award and prior to contract signature, the Successful Respondents (and no other respondents) must provide to the Comptroller electronic copies of its complete Statement of Qualification as submitted in response to this RFQ. No later than the deadline established by the Comptroller for its receipt of such electronic copies, the Successful Respondents shall deliver to the Comptroller a total of four (4) CDs with the following material prior to its signature on the contract, if any, resulting from this RFQ:

* Four CDs, each containing a complete copy of the Successful Respondent's Statement of Qualifications in pdf format. A complete copy of the Statement of Qualifications includes all documents contained in the Statement of Qualifications submitted in response to this RFQ including those documents with the Successful Respondent's signature. These four identical CDs should each be titled: "Complete copy of [Name of the Successful Respondent]'s Statement of Qualifications Comptroller's RFQ#177d."

Summary of Schedule: The anticipated schedule is as follows: Issuance of RFQ by publication in the October 19, 2007, issue of the *Texas Register* and issuance of RFQ, including sample contract, on Electronic State Business Daily - October 19, 2007, 10:00 a.m. CZT; Questions Due - November 2, 2007, 2:00 p.m. CZT; Posting of Official Responses to Questions - November 9, 2007, 5:00 p.m. CZT or as soon thereafter as practical; Statements of Qualifications Due -Monday November 19, 2007, 2:00 p.m. CZT; Mandatory Orientation - December 13-14, 2007; Contract Execution - January 2, 2008, or as soon thereafter as practical; Notice of Contract Awards posted on the Electronic State Business Daily and *Texas Register* on January 18, 2008 or as soon thereafter as practical; and Beginning of Work - January 2, 2008 upon completion of Orientation, or as soon thereafter as practical.

TRD-200704787
Pamela G. Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: October 8, 2007

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Notice of Request for Proposals

Pursuant to Sections 403.011, Chapter 403, and Chapter 2254, Subchapter B, Texas Government Code; Chapter 54, Subchapters F and G, Texas Education Code; and House Bill (H.B.) 3900, 80th Texas Legis-

lature, Reg. Sess. (2007), the Comptroller of Public Accounts (Comptroller) on behalf of the Texas Prepaid Higher Education Tuition Board (Board) announces its Request for Proposals (RFP No. 181a) for consulting services in connection with the search, evaluation, selection and implementation of a plan manager for the new Texas Tomorrow Fund II prepaid higher education tuition program (TTF II or Plan). The successful respondent(s), if any, will be expected to provide consulting services and technical advice and assistance to the Comptroller and Board in the evaluation and selection of the new Plan manager as well as provide all other reasonably-related services, including assistance with implementation. If approved by the Board, the successful respondent(s), if any, will be expected to begin performance of the contract on or about November 26, 2007, or as soon thereafter as practical.

Contact: Parties interested in submitting a proposal should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 E. 17th St., Room G-24, Austin, Texas 78774, (512) 305-8673, to obtain a complete copy of the RFP. The Comptroller will mail copies of the RFP only to those parties specifically requesting a copy. The RFP will be available for pick-up at the above referenced address on Friday, October 19, 2007, after 10:00 a.m. Central Zone Time (CZT), and during normal business hours thereafter. The Comptroller will also make the entire RFP available electronically on the Electronic State Business Daily (ESBD) after 10:00 a.m. on Friday, October 19, 2007. The website address is http://esbd.cpa.state.tx.us

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and non-mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. (CZT) on Monday, October 29, 2007. Respondents are encouraged to fax Non-Mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. The Letter of Intent must be addressed to William Clay Harris, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be signed by an official of that entity. On or before Friday, November 2, 2007, the Comptroller expects to post responses to questions as a revision to the electronic notice of the issuance of the RFP. Late Non-mandatory Letters of Intent and Questions received after the deadline will not be considered; all respondents are solely responsible for ensuring timely receipt of Questions and Letters of Intent in the Issuing Office.

Closing Date: Proposals must be delivered to the Office of the Assistant General Counsel, Contracts, at the location specified above (in ROOM G24) no later than 2:00 p.m. (CZT), on Friday, November 9, 2007. Late proposals received after this time and date will not be considered; all respondents are solely responsible for ensuring timely receipt of proposals in the Issuing Office.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Board makes the final decision on award(s). The Comptroller and the Board each reserve the right to accept or reject any or all proposals submitted. The Comptroller and the Board are not obligated to execute a contract on the basis of this notice or the distribution of any RFP. The Comptroller and the Board shall not pay for any costs incurred by any entity in responding to this Notice or the RFP.

The anticipated schedule of events pertaining to this solicitation is as follows: Issuance of RFP - Friday, October 19, 2007, after 10:00 a.m. CZT; Non-Mandatory Letters of Intent and Questions Due - October 29, 2007, 2:00 p.m. CZT; Official Responses to Questions posted - November 2, 2007; Proposals Due - November 9, 2007, 2:00 p.m. CZT; Contract Execution - November 26, 2007, or as soon thereafter as practical; Services Available under Contract - November 26, 2007.

TRD-200704834
Pamela Smith
Deputy General Counsel for Contracts
Comptroller of Public Accounts
Filed: October 10, 2007

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Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §303.003 and §303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/15/07 - 10/21/07 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 10/15/07 - 10/21/07 is 18% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200704793
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: October 9, 2007

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Texas Education Agency

Notice of Correction: Request for Applications Concerning the Science and Math Outreach Grant, 2007 - 2009

The Texas Education Agency (TEA) published Request for Application (RFA) #701-07-124 concerning the Science and Math Outreach Grant in the September 21, 2007, issue of the *Texas Register* (32 TexReg 6657).

The TEA is amending the deadline for receipt of applications. Applications must be received in the Document Control Center of the TEA by 5:00 p.m. (Central Time), Thursday, November 29, 2007, to be considered for funding. This correction reflects a change from the original deadline date of Thursday, November 8, 2007.

Further Information. For clarifying information about the RFA, contact Vicki Logan, Division of Discretionary Grants, TEA, (512) 463-9269.

TRD-200704835
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Filed: October 10, 2007

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to

comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **November 19, 2007.** Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on November 19, 2007.** Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing.**

(1) COMPANY: Aguas Mart, L.L.C. dba A1 Dry Cleaners; DOCKET NUMBER: 2006-0994-DCL-E; IDENTIFIER: RN104967260; LOCATION: Laredo, Webb County, Texas; TYPE OF FACILITY: dry cleaning drop station; RULE VIOLATED: 30 Texas Administrative Code (TAC) §337.10(a) and Texas Health and Safety Code (THSC), §374.102, by failing to complete and submit the required registration form; PENALTY: $1,185; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 707 East Carlton Road, Suite 304, Laredo, Texas 78041-3887, (956) 791-6611.

(2) COMPANY: Reza S. Mousavi dba Bernard's Liquor Store; DOCKET NUMBER: 2007-0074-PWS-E; IDENTIFIER: RN101176253; LOCATION: Lubbock County, Texas; TYPE OF FACILITY: liquor store with public water supply; RULE VIOLATED: 30 TAC §290.41(c)(3)(M), by failing to provide a sampling tap on the discharge line of each well pump; 30 TAC §290.46(d)(2)(A), by failing to maintain a free chlorine residual of 0.2 milligrams per liter; and 30 TAC §290.46(f) and (f)(2), by failing to maintain records of water works operation activities and failing to provide public water system operating records at the time of the investigation; PENALTY: $312; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(3) COMPANY: Firestone Polymers, LLC; DOCKET NUMBER: 2007-0767-AIR-E; IDENTIFIER: RN100224468; LOCATION: Orange, Orange County, Texas; TYPE OF FACILITY: synthetic rubber plant; RULE VIOLATED: 30 TAC §§113.100, 113.260, 116.115(c), and 122.143(4), 40 Code of Federal Regulations (CFR) §63.504(a)(1) and 63.7(g), Federal Operating Permit (FOP) Number O-1271, General Terms and Conditions, Special Condition (SC) 1D, 8D, and 10A, Air Permit Number 292, SC 8, and THSC, §382.085(b), by failing to complete initial compliance testing for Flare M-600R within 180 days of the initial startup; 30 TAC §113.260 and §122.143(4), 40 CFR §63.504(a)(4), FOP Number O-1271, General Terms and Conditions and SC 1D, and TSHC, §382.085(b), by failing to notify the Administrator of the intent to conduct a performance test at least 30 days before scheduling a performance test; 30 TAC §113.260 and §122.143(4), 40 CFR §63.496(G) and §63.504(a)(5), FOP Number O-1271, General Terms and Conditions and SC 1D, and THSC, §382.085(b), by failing to re-determine compliance of the RTO; 30 TAC §116.115(c) and §122.143(4), FOP Number O-1271, General Terms and Conditions and SC 10A, Air Permit Number 292, SC 14, and THSC, §382.085(b), by failing to establish the pattern and quantities of air contaminants into the atmosphere; and 30 TAC §113.260 and §122.143(4), 40 CFR §63.496(d) and §63.504(a)(5), FOP Number O-1271, General Terms and Conditions and SC 1D, and THSC, §382.085(b), by failing to re-determine compliance of Flare DM-801; PENALTY: $27,875; ENFORCEMENT COORDINATOR: Daniel Siringi, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(4) COMPANY: Zulfiqar Ali dba Fuel Express 4; DOCKET NUMBER: 2007-0043-PST-E; IDENTIFIER: RN101894178; LOCATION: Channelview, Harris County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §334.51(b)(1)(B) and the Code, §26.3475(c)(2), by failing to install overfill prevention equipment for the underground storage tank (UST) system; 30 TAC §334.22(a) and the Code, §5.702, by failing to pay outstanding UST fees and associated late fees; 30 TAC §334.50(d)(4)(A)(i) and the Code, §26.3475(c)(1), by failing to conduct reconciliation of detailed inventory control records; and 30 TAC §334.50(d)(4)(A)(ii)(II) and the Code, §26.3475(c)(1), by failing to perform an automatic test for substance loss that can detect a release; PENALTY: $4,340; ENFORCEMENT COORDINATOR: Rajesh Acharya, (512) 239-0577; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(5) COMPANY: Marshall Hubbard; DOCKET NUMBER: 2007-1563-OSI-E; IDENTIFIER: RN105240543; LOCATION: Crockett County, Texas; TYPE OF FACILITY: on-site sewage facility installer; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(6) COMPANY: Larry G. Little; DOCKET NUMBER: 2007-1561-WOC-E; IDENTIFIER: RN103479135; LOCATION: McAdoo, Dickens County, Texas; TYPE OF FACILITY: wastewater operator; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(7) COMPANY: Meador Oldsmobile, Inc. dba Meador Chrysler Jeep; DOCKET NUMBER: 2006-0639-PST-E; IDENTIFIER: RN102050481; LOCATION: Tarrant County, Texas; TYPE OF FACILITY: car dealership with fleet refueling; RULE VIOLATED: 30 TAC §334.50(d)(1)(B), by failing to implement inventory control methods; PENALTY: $1,750; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(8) COMPANY: Rosendo Moreno; DOCKET NUMBER: 2007-1562-WOC-E; IDENTIFIER: RN103932497; LOCATION: Sinton, San Patricio County, Texas; TYPE OF FACILITY: wastewater operator; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: $210; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-503, (361) 825-3100.

(9) COMPANY: Daniel Viss dba Daniel Viss Dairy; DOCKET NUMBER: 2007-1104-AGR-E; IDENTIFIER: RN102065463; LOCATION: Erath County, Texas; TYPE OF FACILITY: dairy farm; RULE VIOLATED: 30 TAC §321.47(h)(1)(A), by failing to cease

applying waste or wastewater to the land management unit (LMU); 30 TAC §321.47(g)(4), by failing to collect annual soil samples from the LMUs; and 30 TAC §321.47(f)(11), by failing to conduct an annual analysis of at least one representative sample of irrigation wastewater and manure/litter for total nitrogen, total phosphorus, and total potassium; PENALTY: $2,650; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: Water World Fiberglass Pools (U.S.A.) Inc.; DOCKET NUMBER: 2007-1161-AIR-E; IDENTIFIER: RN104314273; LOCATION: Kingsbury, Guadalupe County, Texas; TYPE OF FACILITY: fiberglass pool manufacturing plant; RULE VIOLATED: 30 TAC §122.143(4) and §122.146(1), FOP Number O-0208, General Terms and Conditions, and THSC, §382.085(b), by failing to submit the Title V annual compliance certification; PENALTY: $2,850; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

TRD-200704791
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: October 9, 2007

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Notice of District Petition

Notice issued October 9, 2007.

TCEQ Internal Control No. 08152007-D01; Eagle Mountain Reserve, LLC, (Petitioner) filed a petition for creation of Burnet County Municipal Utility District No. 2 (District) with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land, consisting of two tracts, to be included in the proposed District; (2) there are no lien holders on the property to be included in the proposed District; (3) the proposed District will contain approximately 117 acres located in Burnet, Texas; and (4) the proposed District is not within the extraterritorial jurisdiction of any municipality, and no portion of land within the proposed District is within the corporate limits or extraterritorial jurisdiction of any other city, town or village in Texas. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $9,000,000.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing"; (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to TCEQ, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200704844
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 10, 2007

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Notice of Water Quality Applications

The following notices were issued during the period of September 20, 2007 through October 4, 2007.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to TCEQ, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

AUC GROUP, L.P. has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014724002, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 995,000 gallons per day. The facility will be located approximately 1,700 feet north-northwest of the intersection of Hanselman Road and County Road 67, on the west side of Chocolate Bayou in Brazoria County, Texas.

CMH PARKS, INC. has applied for a renewal of TPDES Permit No. WQ0012218001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 122,000 gallons per day. The facility is located at 14022 Walters Road approximately 3.5 miles west of Interstate Highway 45 and 0.75 miles south of Farm-to-Market Road 1960 in Harris County, Texas.

CNP UTILITY DISTRICT has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0011239001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 2,500,000 gallons per day. The facility is located at 530 Cypress Station Drive, Houston, on the south bank of Cypress Creek approximately 2,700 feet west of Interstate Highway 45 in Harris County, Texas.

CYPRESS-KLEIN UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0011366001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed

700,000 gallons per day. The facility is located on Cypresswood Boulevard approximately 1500 feet north of Cypress Creek and 3500 feet north of the intersection of Steubner-Airline Road and Strack Road in Harris County, Texas.

ERVIN DON CRUTCHER which proposes to operate Douglassville Timber Company, has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004828000, to authorize the discharge of wet decking wastewater and storm water on an intermittent and flow variable basis via Outfall 001. The facility is located at 307 North Louise Street, Suite B, Red River County, Texas.

FELLOWSHIP CHURCH has applied to the Texas Commission on Environmental Quality (TCEQ) for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014820001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 40,000 gallons per day. The facility will be located 950 feet north of the intersection of County Road 3841 and County Road 7850 and then 600 feet east of County Road 3841 in Wood County, Texas.

FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT NO. 34 has applied for a major amendment to TPDES Permit No. WQ0012298001 to authorize an increase in the discharge of treated domestic wastewater from a daily average flow not to exceed 900,000 gallons per day to an annual average flow not to exceed 1,000,000 gallons per day. The facility is located approximately 2.1 miles east-northeast of the intersection of Farm-to-Market Roads 1093 and 723 in Fort Bend County, Texas.

HANSON AGGREGATES, INC. which operates a limestone crushing and washing plant, has applied for a major amendment to TPDES Permit No. WQ0001406000 to authorize the combining and relocation for Outfalls 001 and 002 to a new location, (Outfall 001A), to cease the monitoring requirements for total dissolved solids from Outfall 001 at the new location. The current permit authorizes the discharge of wash water and storm water on an intermittent and flow variable basis via Outfall 001 and storm water on an intermittent and flow variable basis via Outfall 002. The draft permit authorizes the discharge of treated mine water (seeping groundwater and dewatering water wells), wash water and storm water on an intermittent and flow variable basis via Outfall 001 and wash water and storm water on an intermittent and flow variable basis via Outfall 002. The facility is located on Farm-to-Market Road 2952, one-half mile east of Lake Bridgeport and three miles west of the City of Bridgeport, Wise County, Texas.

HARRIS COUNTY has applied for a renewal of TPDES Permit No. WQ0013561001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 500,000 gallons per day. The facility is located within the grounds of the Harris County Detention Center, 500 feet south of Atascocita Road and approximately one mile southeast of the intersection of Atascocita Road and Wilson Road at 2310 Atascocita Road in Harris County, Texas.

HARRIS COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 119 has applied for a renewal of TPDES Permit No. WQ0011024001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 995,000 gallons per day. The facility is located approximately 2,000 feet south of Spring Cypress Road and 5,000 feet east of the intersection of Louetta and Spring Cypress Roads in Harris County, Texas.

HUMBLE PARTNERS LIMITED PARTNERSHIP has applied for a renewal of TPDES Permit No. WQ0011161001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 99,000 gallons per day. The facility is located approximately 1,000 feet east of the intersection of Atascocita Road and Old Humble Road in Harris County, Texas.

CITY OF INGLESIDE has applied for a major amendment to TPDES Permit No. WQ0010422001 to authorize the discharge of treated domestic wastewater at an annual average flow not to exceed 1,200,000 gallons per day and to reduce the monitoring frequency for reporting requirements of Total Copper. The existing permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,720,000 gallons per day. The facility is located on the southeast corner of Avenue B and Eighth Street, approximately 0.10 mile southwest of the intersection of Eighth Street and Farm-to-Market Road 1069 in San Patricio County, Texas. The TCEQ Executive Director has reviewed this action for consistency with the Texas Coastal Management Program goals and policies in accordance with the regulations of the Coastal Coordination Council, and has determined that the action is consistent with the applicable CMP goals and policies.

CITY OF JACINTO CITY has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0010195001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,640,000 gallons per day. The facility is located just southeast of the Market Street Bridge over Hunting Bayou in Jacinto City in Harris County, Texas.

LUCITE INTERNATIONAL, INC. which operates a petrochemical plant complex producing organic and inorganic chemicals in separate units, has applied for a major amendment to TPDES Permit No. WQ0000473000 to suspend monitoring for metals at Outfall 101 until the BMC OCPSF Methanol Plant resumes operation; remove daily average limitations for biochemical oxygen demand (5-day) and total suspended solids at Outfall 101; remove monitoring requirements for aldrin, alpha-hexachlorocyclohexane, beta-hexachlorocyclohexane, and gamma-hexachlorocyclohexane at Outfall 018; remove monitoring requirements for 4,4'-DDT at Outfall 020; remove the monitoring requirements for aldrin, endrin, dieldrin, heptachlor, heptachlor epoxide, 4,4'-ddd, 4,4'-dde, and beta-hexachlorocyclohexane at Outfall 010 and replace existing Outfall 010 with new Outfall 021; authorize the flow variable discharge of utility wastewater via Outfalls 002, 006, 008 and 021; remove Outfall 201; restructure the effluent limitations at Outfalls 001 into tiered permit limitations to allow for different production scenarios; remove effluent limitations and monitoring requirements for 2-chlorophenol, 2,4-dichlorophenol; 2,4-dinitrotoluene, and 2,6-dinitrotoluene at Outfall 001 during specified tiers; and replace the petroleum and oil and grease based products storage prohibition for Outfall 015 with oil and grease effluent limitations. The current permit authorizes the discharge of process wastewater, remediated groundwater, utility wastewater, storm water, and previously monitored effluent (from internal Outfalls 101 and 201) via Outfall 001 at a daily average flow not to exceed 9,990,000 gallons per day; domestic wastewater and process wastewater from the Bio-Ox Unit on a flow variable basis via Outfall 101; process wastewater from the Hypalon Unit on a flow variable basis via Outfall 201; and storm water from various plant areas on an intermittent and flow variable basis via Outfalls 002, 004, 005, 006, 008, 010, 011, 015, 018, and 020. The facility is located on State Highway 347, on the west bank of the Neches River at the McFaddin Bend Cutoff, eight miles north of Sabine Lake, and six miles south of the City of Beaumont, Jefferson County, Texas.

CITY OF WILLS POINT has applied for a new permit, proposed Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0014834001, to authorize the discharge of treated domestic wastewater at a daily average flow not to exceed 800,000 gallons per day. The facility was previously permitted under TPDES Permit No. 10623-001, which expired on December 01, 2006. The interim phase

facility is located off Goshen Avenue, approximately 4,000 feet east of State Highway 47 and 6,000 feet south of U.S. Highway 80 in Van Zandt County, Texas. The final phase facility will be located off Goshen Avenue, approximately 3,400 feet east of State Highway 47 and 6,500 feet south of U.S. Highway 80 in Van Zandt County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en español, puede llamar al 1-800-687-4040.

TRD-200704845
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: October 10, 2007

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Texas Health and Human Services Commission

Notice of Intent to Renew Consultant Contract

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, the Health and Human Services Commission (HHSC) furnishes this notice of intent to renew a consultant contract.

HHSC issued the Request for Proposals (RFP) from qualified consultants to procure technical expertise to assist in the strategic development, implementation, and evaluation of a Texas healthy marriage initiative pursuant to this RFP. The original notice of request for proposals (RFP #529-05-0115A) was posted on HHSC's Business Opportunities Page under HHSC Contracting Opportunities link at http://www.hhsc.state.tx.us/about_hhsc/BusOpp/BO_opportunities.html. HHSC also posted notice of the procurement on the Texas Marketplace on June 22, 2005.

The contract was awarded to Public Strategies, Inc., 301 Northwest 63rd Street, Suite 600, Oklahoma City, Oklahoma 73116. Notice of the award of the original contract was posted on HHSC's Business Opportunities Page under HHSC Contracting Opportunities link on August 15, 2005. The original contract included options to extend the contract as necessary and HHSC intends to exercise this option.

HHSC intends to extend the contract through August 31, 2008, and to increase the amount by $1,350,000 for a Total Amount of $2,650,000 unless they receive a better offer for the desired services. Any consultant submitting an offer in response to this Invitation must provide the following:

1. Consultant's legal name, including type of entity (individual, partnership, corporation, etc.), and address;

2. Background information regarding the consultant, including the number of years in business and the number of employees;

3. Information regarding the qualifications, education, and experience of the team members proposed to conduct the requested services;

4. The hourly rate to be charged for each team member providing services;

5. The earliest date by which the consultant could begin providing the services;

6. A list of five client references for which consultant has provided consulting services;

7. A statement of consultant's approach to the project (i.e., the services described in this notice), any unique benefits consultant offers HHSC, and any other information consultant desires HHSC to consider in connection with consultant's offer;

8. Information to assist HHSC in assessing consultant's demonstrated competence and experience providing consulting services similar to the services requested in this notice;

9. Information to assist HHSC in assessing the consultant's knowledge of and experience with research related to marriage across a wide array of audiences, and have demonstrated expertise in promoting and/or implementing public marriage policy for state government(s). http://www.hhsc.state.tx.us/about_hhsc/Contracting/rfp_attch/attach.html:

a. Child Support Certification;

b. Debarment, Suspension, Ineligibility and Voluntary Exclusion for Covered Contracts;

c. Federal Lobbying Certification;

d. Nondisclosure Statement;

e. Proposer Information; and

f. HUB Subcontracting Plan Forms (Pre-Award). To search for potential HUB vendors who may perform subcontracting opportunities, respondents may refer to the Texas Building and Procurement Commission's Centralized Master Bidders List HUB Directory, which is found at http://www2.cpa.state.tx.us/cmbl/cmblhub.html. Class and item codes for potential subcontracting opportunities under this notice, include, but are not limited to: Class 918 -- "Consulting Services;" Item 58 -- "Governmental Consulting".

Failure to submit the required forms will result in HHSC's disqualification of the offer.

10. Information to assist HHSC in assessing whether the consultant will have any conflicts of interest in performing the requested services.

Competing offers must be sent to Rex Miller, Health and Human Services Commission, 909 West 45th St., Bldg. 2, Austin Texas 78751. To be considered, all competing offers must be received at the foregoing address on or before 4:00 p.m. Central Time on October 31, 2007. Offers received after this time and date will not be considered. Any offers received will be evaluated on the basis of demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the services. Exercise of this option to extend is contingent upon receipt of a finding of fact from the Governor's Office of Budget and Planning that the requested consulting services are necessary. All questions regarding this notice must be sent in writing to Mr. Miller at the address stated above, or by email to rex.miller@hhsc.state.tx.us by 4:00 p.m. Central Time on October 19, 2007.

TRD-200704682
David Brown
Assistant General Counsel
Texas Health and Human Services Commission
Filed: October 4, 2007

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Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit to the Centers for Medicare and Medicaid Services an amendment to the Home and Community-based Services (HCS) 1915(c) waiver program. The current waiver is scheduled to expire August 31, 2008.

The HCS program provides individualized services and supports to persons with mental retardation or a related condition who are living in their own homes, their families' homes, or other community settings such as foster/companion care homes or small group homes.

Services include case management, respite care, adaptive aids, minor home modifications, counseling and therapies (audiology, speech/language pathology, occupational therapy, physical therapy, dietary services, social work, and psychology), dental treatment, skilled nursing, residential assistance, supported home living, foster/companion care, supervised living, residential support, respite, day habilitation, and supported employment

The purpose of this waiver amendment is to add 1,758 new placements in the waiver program. In addition, this amendment allows the State to offer the HCS program to persons whose cost of home and community-based services can reasonably be expected to exceed the cost of care provided in an intermediate care facility for individuals with mental retardation. The proposed waiver amendment will be effective September 1, 2007.

HHSC is requesting that the waiver amendment be approved for a seven month period beginning January 1, 2008, through August 31, 2008. This amendment maintains cost neutrality of service-costs for federal fiscal years 2007 through 2008.

To obtain copies of the proposed waiver amendment, interested parties may contact Christine Longoria by mail at Texas Health and Human Services Commission, P.O. Box 85200, mail code H-620, Austin, Texas 78708-5200, phone (512) 491-1152, fax (512) 491-1953, or by e-mail at christine.longoria@hhsc.state.tx.us.

TRD-200704790
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: October 8, 2007

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Department of State Health Services

Maximum Fees Allowed for Providing Health Care Information Effective October 19, 2007

The Department of State Health Services licenses general and special hospitals in accordance with the Health and Safety Code, Chapter 241. In 1995, the Texas Legislature amended the law to address the release and confidentiality of health care information. In accordance with Health and Safety Code, §241.154(e), the fee for providing a patient's health care information has been adjusted 1.8% to reflect the most recent changes to the consumer price index as published by the Bureau of Labor Statistics (BLS) of the United States Department of Labor. The BLS measures the average changes in prices of goods and services purchased by urban wage earners and clerical workers.

Health and Safety Code, §241.154 Provisions:

(b) Except as provided by subsection (d), the hospital or its agent may charge a reasonable fee for providing the health care information and is not required to permit the examination, copying, or release of the information requested until the fee is paid unless there is a medical emergency. The fee may not exceed the sum of:

(1) a basic retrieval or processing fee, which must include the fee for providing the first 10 pages of copies and which may not exceed $40.06; and

(A) a charge for each page of:

(i) $1.35 for the 11th through the 60th page of provided copies;

(ii) $.67 for the 61st through the 400th page of provided copies;

(iii) $.35 for any remaining pages of the provided copies; and

(B) the actual cost of mailing, shipping, or otherwise delivering the provided copies; or

(2) if the requested records are stored on any microform or other electronic medium, a retrieval or processing fee, which must include the fee for providing the first 10 pages of the copies and which may not exceed $61.03; and

(A) $1.35 per page thereafter; and

(B) the actual cost of mailing, shipping, or otherwise delivering the provided copies.

(c) In addition, the hospital or its agent may charge a reasonable fee for:

(1) execution of an affidavit or certification of a document, not to exceed the charge authorized by Civil Practice and Remedies Code, §22.004; and

(2) written responses to a written set of questions, not to exceed $13.55 for a set.

(d) A hospital may not charge a fee for:

(1) providing health care information under subsection (b) to the extent the fee is prohibited under Chapter 161, Subchapter M;

(2) a patient to examine the patient's own health care information;

(3) providing an itemized statement of billed services to a patient or third-party payor, except as provided under §311.002(f); or

(4) health care information relating to treatment or hospitalization for which workers' compensation benefits are being sought, except to the extent permitted under Labor Code, Chapter 408.

This is published only as a courtesy to licensed hospitals. Hospitals are responsible for verifying that any fees charged for health care information are in accordance with the Health and Safety Code, Chapter 241.

To locate Civil Practice and Remedies Code, §22.004; Health and Safety Code, Chapter 161, Subchapter M, §§161.201 - 161.204, and §311.002; and the Labor Code, Chapter 408, go to: http://tlo2.tlc.state.tx.us/statutes/statutes.html.

Further information may be obtained by contacting the Department of State Health Services, Facility Licensing Group, 1100 West 49th Street, Austin, Texas 78756, telephone number (512) 834-6648.

TRD-200704694
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: October 5, 2007

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Texas Department of Insurance, Division of Workers' Compensation

Correction of Error

The Texas Department of Insurance, Division of Workers' Compensation proposed amendments to 28 TAC §134.1 and new rules §§134.2, 134.203, and 134.204 in the October 5, 2007, issue of the *Texas Register* (32 TexReg 6966). The following typographical errors as submitted appear in the preamble and the rule text.

In the preamble:

Page 6967, right column, 3rd complete paragraph, 2nd sentence: The cite §413.0551(b)(1) should be §413.0511(b)(1).

The sentence should read as follows: "The two proposed conversion factors are established in consultation with the Medical Advisor pursuant to Labor Code §413.0511(b)(1)."

Page 6971, right column, under Subchapter A, 1st paragraph, 3rd line: The cite §413.0551 should be §413.0511.

The sentence should read as follows: "The amended rule and new rules are proposed under the Texas Labor Code §§408.021, 413.002, 413.007, 413.011, 413.012, 413.0511, 408.0252, 413.013, 413.014, 413.015, 413.016, 413.017, 413.019, 413.031; 402.0111, and 402.061."

Page 6971, right column, under Subchapter A, 2nd paragraph, 6th sentence: The cite §413.0551 should be §413.0511.

The sentence should read as follows: "Section 413.0511 requires the Medical Advisor to make recommendations regarding the adoption of rules and policies to develop, maintain, and review guidelines as provided by §413.011."

Page 6971, right column, under Subchapter A, 2nd paragraph, 7th sentence: The word "provides" should be "providers".

The sentence should read as follows: "Section 408.0252 allows the commissioner of workers' compensation to identify areas of the state in which access to health care providers is less available and adopt appropriate standards, guidelines, and rules regarding the delivery of health care in those areas."

Page 6971, right column, under Subchapter A, 3rd paragraph, 3rd line: The cite §413.0551 should be §413.0511.

The sentence should read as follows: "The following sections are affected by this proposal: Labor Code §§408.021, 408.0252, 413.002, 413.007, 413.011 - 413.017, 413.019, 413.031; 402.0111, 413.0511 and 402.061."

Page 6972, right column, under Subchapter C, 1st paragraph, 3rd line: The cite §413.0551 should be §413.0511.

The sentence should read as follows: "The amended rule and new rules are proposed under the Texas Labor Code §§408.021, 413.002, 413.007, 413.011, 413.012, 413.0511, 408.0252, 413.013, 413.014, 413.015, 413.016, 413.017, 413.019, 413.031; 402.0111, and 402.061."

Page 6972, right column, under Subchapter C, 2nd paragraph, 6th sentence: The cite §413.0551 should be §413.0511.

The sentence should read as follows: "Section 413.0511 requires the Medical Advisor to make recommendations regarding the adoption of rules and policies to develop, maintain, and review guidelines as provided by §413.011."

Page 6972, right column, under Subchapter C, 2nd paragraph, 7th sentence: The word "provides" should be "providers".

The sentence should read as follows: "Section 408.0252 allows the commissioner of workers' compensation to identify areas of the state in which access to health care providers is less available and adopt appropriate standards, guidelines, and rules regarding the delivery of health care in those areas."

Page 6973, left column, 1st complete paragraph, 3rd line: The cite §413.0551 should be §413.0511.

The sentence should read as follows: "The following sections are affected by this proposal: Labor Code §§408.021, 408.0252, 413.002, 413.007, 413.011 - 413.017, 413.019, 413.031; 402.0111, 413.0511 and 402.061."

In the rule text portion:

Page 6976, right column, 2nd paragraph: The wording "paragraphs (1) - (5) of this subsection" should be "subparagraphs (A) - (E) of this paragraph".

The sentence should read as follows:

(F) Issues similar to those described in subparagraphs (A) - (E) of this paragraph shall be billed and reimbursed in accordance with subsection (k) of this section, with the use of the additional modifier "W9".

TRD-200704846

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Notice of Public Hearing

The Texas Department of Insurance, Division of Workers' Compensation (TDI) will hold a public hearing on Monday, November 5, 2007 in the Room 100 at the Hobby Building, 333 Guadalupe Street in Austin.

The public hearing will begin at 1:00 p.m. and TDI will take testimony on the following rules:

CHAPTER 134 - Benefits--Guidelines for Medical Services, Charges and Payments

Subchapter A - Medical Reimbursement Policies

§134.1. Medical Reimbursement (Amendment).

§134.2. Incentive Payments for Workers' Compensation Underserved Areas (New).

Subchapter C - Medical Fee Guidelines

§134.203. Medical Fee Guideline for Professional Services (New).

§134.204. Medical Fee Guideline for Workers' Compensation Specific Services (New).

These proposed rules were published in the *Texas Register* on October 5, 2007, and may be viewed on the TDI website at *http://www.tdi.state.tx.us/wc/rules/proposedrules/toc.html.* The comment period for these rules will close on November 5, 2007 at 5:00 p.m.

TDI offers reasonable accommodations for persons attending meetings, hearings, or educational events, as required by the Americans with Disabilities Act. If you require special accommodations, contact Idalia Cantú at (512) 804-4403 at least of two days prior to the hearing date.

For further information regarding this notice, contact Blanca Guardiola of the Division's Legal and Compliance Section at (512) 804-4716.

TRD-200704789
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: October 8, 2007

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Texas Lottery Commission

Instant Game Number 1001 "X's & O's" Revised

The Texas Lottery Commission filed for publication Instant Game Number 1001 "X's and O's." The document was published in the September 14, 2007, issue of the *Texas Register* (32 TexReg 6438). The programmed game parameter in paragraph 2.2.A, regarding adjacent tickets within a pack having identical patterns, was deleted

after the procedures were filed in the *Texas Register*. Section 2.2 "Programmed Game Parameters" now reads as follows:

2.2 Programmed Game Parameters.

A. There will be a random distribution of all symbols on the ticket unless affected by other constraints, play action or prize structure.

B. All games on the ticket will be unique. Identical games are defined as two games having the same symbols in the same positions.

C. Each game will have either four (4) X's and five (5) O's, or five (5) X's and four (4) O's, except when required by the prize structure.

D. In each game, play symbols will be used evenly to form winning matches, unless affected by other constraints in this document.

E. In each game, winning patterns will be distributed randomly, except as required by prize structure and other constraints. A pattern is the complete Tic Tac Toe grid, example: XXXXOOOXO.

TRD-200704677
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: October 4, 2007

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Texas Parks and Wildlife Department

Notice of Hearing and Opportunity for Public Comment

This is a notice of an opportunity for public comment and a public hearing on Ben M. Patterson, Jr.'s application for a Texas Parks and Wildlife Department (TPWD) permit to dredge state-owned sand and gravel from the Nueces River and Hackberry Creek in Edwards County at a location approximately 7 miles downstream from the Highway 335 crossing of Hackberry Creek and approximately 4 miles upstream from the Highway 335 crossing of the Nueces River.

The hearing will be held at 11:00 a.m. on Friday, November 9, 2007 at TPWD Headquarters, 4200 Smith School Rd., Austin, TX 78744.

The hearing is not a contested case hearing under the Administrative Procedure Act.

Written comments must be submitted within 30 days of the publication of this notice in the *Texas Register* or the newspaper, whichever is later, or at the public hearing.

Submit written comments, questions, or requests to review the application to: Beth Hilliard, TPWD, by mail: 4200 Smith School Rd., Austin, TX 78744; fax (512) 389-4482; or e-mail, beth.hilliard@tpwd.state.tx.us.

TRD-200704673
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Filed: October 3, 2007

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Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on October 5, 2007, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 34872 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 34872.

TRD-200704825
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 9, 2007

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on October 5, 2007, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Southwestern Bell Telephone Company d/b/a AT&T Texas for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 34874 before the Public Utility Commission of Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 34874.

TRD-200704826
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 9, 2007

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Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On October 2, 2007, InfoHighway filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60293. Applicant intends to reflect a change in ownership/control.

The Application: Application of InfoHighway for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 34835.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than October 25, 2007. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 34835.

TRD-200704684
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2007

♦ ♦ ♦

Notice of Application for Amendment to Service Provider Certificate of Operating Authority

On October 2, 2007, Broadview Networks, Inc. filed an application with the Public Utility Commission of Texas (commission) to amend its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60352. Applicant intends to reflect a change in ownership/control.

The Application: Application of Broadview Networks, Inc. for an Amendment to its Service Provider Certificate of Operating Authority, Docket Number 34837.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas, 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than October 25, 2007. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 34837.

TRD-200704686
Adriana A. Gonzales
Rule Coordinator
Public Utility Commission of Texas
Filed: October 4, 2007

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Notice of Application for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider

Notice is given to the public of an application filed with the Public Utility Commission of Texas on October 8, 2007, for designation as an eligible telecommunications carrier (ETC) and eligible telecommunications provider (ETP) pursuant to P.U.C. Substantive Rule §26.418 and §26.417, respectively.

Docket Title and Number: Application of Express Cash and Phone, Inc. d/b/a Talk Now Telco for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider. Docket Number 34881.

The Application: The company is requesting ETC/ETP designation in order to be eligible to receive federal and state universal service funding to assist it in providing universal service in Texas. Pursuant to 47 U.S.C. §214(e), the commission, either upon its own motion or upon request, shall designate qualifying common carriers as ETCs and ETPs for service areas set forth by the commission. Talk Now Telco seeks ETC/ETP designation in the study area of AT&T as identified in Exhibit 1 of the application.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by November 15, 2007. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477. All comments should reference Docket Number 34881.

TRD-200704827
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 9, 2007

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Notice of Application for Waiver of Denial of Request for NXX Code

Notice is given to the public of the filing with the Public Utility Commission of Texas an application on October 2, 2007, for waiver of denial by the Pooling Administrator (PA) of Southwestern Bell Telephone, LP d/b/a AT&T Texas' request for one thousand block of numbers in the Port Arthur rate center.

Docket Title and Number: Petition of Southwestern Bell Telephone, LP d/b/a AT&T Texas for Waiver of Denial of Numbering Resources in the Port Arthur rate center, Docket Number 34836.

The Application: Southwestern Bell Telephone, LP d/b/a AT&T Texas submitted an application to the PA for a one thousand block of numbers in accordance with the current guidelines. AT&T requires additional non-EMS numbering resources to meet its customer's demand. The PA denied the request because AT&T Texas did not meet the month-to-exhaust and utilization criteria established by the Federal Communications Commission.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than October 18, 2007. Hearing and speech-impaired individuals with text telephones (TTY) may contact the Commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 34836.

TRD-200704685
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 4, 2007

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Notice of Filing to Withdraw Services Pursuant to P.U.C. Substantive Rule §26.208

Notice is given to the public of Verizon's application filed with the Public Utility Commission of Texas (commission) on September 14, 2007, to withdraw services pursuant to P.U.C. Substantive Rule §26.208.

Docket Title and Number: Application of Verizon Southwest to Withdraw Out of Calling Scope (OOCS) PRI Access from its Texas General Exchange Tariff; Section 35, Sheet Nos. 3.1, 6, 6.3; Docket Number 34746.

The Application: Verizon Southwest (Verizon) has filed an application to remove its Out of Calling Scope (OOCS) service from its Texas General Exchange Tariff. Verizon stated the service is being withdrawn because it has been replaced by the ability to provide Foreign Exchange or Foreign Central Office as an alternative to OOCS. According to Verizon, there are no subscribers to this service; thus, Verizon seeks a waiver of notice requirements. This proceeding was docketed and suspended on September 19, 2007, to allow adequate time for review and intervention.

Persons wishing to comment on this application should contact the Public Utility Commission of Texas, by November 8, 2007, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free 1-800-735-2989. All correspondence should refer to Docket Number 34746.

TRD-200704693
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 5, 2007

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Notice of Intent to Implement Minor Rate Changes Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of West Texas Rural Telephone Cooperative, Inc. application filed with the Public Utility Commission of Texas (commission) on September 27, 2007, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Docket Title and Number: West Texas Rural Telephone Cooperative, Inc. Statement of Intent to Implement a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171; Tariff Control Number 34805.

The Application: West Texas Rural Telephone Cooperative, Inc. (West Texas Rural Telephone) filed an application to implement a minor rate change to the following services: the intrastate intraLATA Long Distance Service, Operator Service Charges, and the local and intraLATA Directory Assistance Service Charges in the Cooperative's Long Distance Message Telecommunications Service (LDMTS) Tariff. West Texas Rural Telephone also seeks to eliminate the monthly call allowance of three free calls to Directory Assistance and remove the obsolete Service Charges for Operator, Station-to-Station, Collect, Fully Automated, and Billed to Third Number, Fully Automated, that are no longer provided by the Cooperative's Directory Assistance Provider, AT&T Texas. In addition, West Texas Rural Telephone proposes to make text changes to correct and clarify information in its LDMTS Tariff. The proposed effective date for the proposed rate changes is December 31, 2007. The estimated annual revenue increase recognized by West Texas Rural Telephone is $12,303 or less than 5% of its gross annual intrastate revenues. West Texas Rural Telephone has 2,052 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by the lesser of 5% or 1,500 of the affected local service customers to which this application applies by November 30, 2007, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by November 30, 2007. Requests to intervene should be mailed to the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 34805.

TRD-200704782
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 8, 2007

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Notice of Intent to Implement Minor Rate Changes Pursuant to P.U.C. Substantive Rule §26.171

Notice is given to the public of Nortex Communications' application filed with the Public Utility Commission of Texas (commission) on September 27, 2007, for approval of a minor rate change pursuant to P.U.C. Substantive Rule §26.171.

Docket Title and Number: Nortex Communications Statement of Intent to Implement a Minor Rate Change Pursuant to P.U.C. Substantive Rule §26.171; Tariff Control Number 34806.

The Application: Nortex Communications (Nortex) filed an application to implement a minor rate change to the following services: the intrastate intraLATA Long Distance Service, Operator Service Charges, and the local and intraLATA Directory Assistance Service Charges in its Long Distance Message Telecommunications Service (LDMTS) Tariff. Nortex also seeks to reduce the monthly call allowance from three free calls to one free call to Directory Assistance and remove the obsolete Service Charges for Operator, Station-to-Station, Collect, Fully Automated, and Billed to Third Number, Fully Automated, that are no longer provided by Nortex's Directory Assistance Provider, AT&T Texas. In addition, Nortex proposes to make minor text changes to correct and clarify information in its LDMTS Tariff. The proposed effective date for the proposed rate changes is January 1, 2008. The estimated annual revenue increase recognized by Nortex is $24,406 or less than 5% of its gross annual intrastate revenues. Nortex has 4,170 access lines (residence and business) in service in the state of Texas.

If the commission receives a complaint(s) relating to this application signed by the lesser of 5% or 1,500 of the affected local service customers to which this application applies by November 30, 2007, the application will be docketed. The 5% limitation will be calculated based upon the total number of customers of record as of the calendar month preceding the commission's receipt of the complaint(s).

Persons wishing to comment on this application should contact the Public Utility Commission of Texas by November 30, 2007. Requests to intervene should be mailed to the commission's Filing Clerk at P.O. Box 13326, Austin, Texas 78711-3326, or you may call the commission at (512) 936-7120 or toll-free 1-800-735-2989. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136. All correspondence should refer to Tariff Control Number 34806.

TRD-200704783
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: October 8, 2007

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San Antonio-Bexar County Metropolitan Planning Organization

Request for Proposal

The San Antonio-Bexar County Metropolitan Planning Organization (MPO) is seeking proposals from qualified firms to perform an audit of expenditures of funds provided by the United States Department of Transportation (USDOT) for each of the five (5) fiscal years: 2006 - 2007, 2007 - 2008, 2008 - 2009, 2009 - 2010 and 2010 - 2011. The audit will be performed in accordance with the requirements of the Office of Management and Budget (OMB) Circular A-133.

A copy of the Request for Proposals (RFP) may be requested by calling Jeanne Geiger, Deputy Director, at (210) 227-8651 or by downloading the RFP and any required attachments from the MPO's website at www.sametroplan.org. Anyone wishing to submit a proposal must do so by 12:00 p.m. (CST), Friday, November 16, 2007 at the MPO office to:

Jeanne Geiger, Deputy Director

San Antonio-Bexar County MPO

825 S. St. Mary's

San Antonio, Texas 78205

The contract award will be made by the MPO's Transportation Policy Board based on the recommendation of the MPO's Audit Committee. The Audit Committee will review the proposals based on the evaluation criteria listed in the RFP.

Funding for this project, in the amount of $100,000 over the five year period, is contingent upon the availability of Federal transportation planning funds.

TRD-200704680
Mona Lisa Zertuche
Transportation Assistant Planner
San Antonio-Bexar County Metropolitan Planning Organization
Filed: October 4, 2007

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Stephen F. Austin State University

Notice of Consultant Contract Award

In compliance with the provisions of Chapter 2254, Subchapter B, Texas Government Code, Stephen F. Austin State University furnishes this notice of consultant contract award. The consultant will provide ELL School Supervision in support of Project ENLACE goals. The Notice of Availability was filed in the July 27, 2007, issue of the *Texas Register* (32 TexReg 4611).

The contract was awarded to Marsha Jacobson, 3217 Bryan Street, Nacogdoches, TX 75965, for an amount not to exceed $28,000 for five years, totaling $140,000.

The beginning date of the contract is September 11, 2007, and the ending date is July 1, 2012.

Documents, films, recording, or reports of intangible results may be presented by the outside consultant.

For further information, please call (936) 468-2908.

TRD-200704691
R. Yvette Clark
General Counsel
Stephen F. Austin State University
Filed: October 5, 2007

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WorkSource-Greater Austin Area Workforce Board

Request for Quote for Audit Services

WorkSource-Greater Austin Area Workforce Board has issued a Request for Quote for Audit Services. WorkSource is a non-profit corporation with a 501(c)(3) tax-exempt status from the Internal Revenue Service. WorkSource is governed by a twenty-seven (27) member board of directors representing business, labor, education, economic development, community-based organizations, and government.

The scope of work shall include:

• An entrance conference with the Executive Director and other members of WorkSource's management team to discuss to requirements, reports, documentation, timelines, etc. of the audit;

• The audit will include, at a minimum, financial statements, independent auditor's opinion reports, schedule of expenditures of state and federal awards, schedule of findings and questioned costs, schedule of prior audit findings and questioned costs, corrective action plan, supplementary schedules, management letter, and letter on conduct of audit;

• Exit conference with the Executive Director and other members of WorkSource's management team;

• Presentation of audit report to the Board of Directors;

• Preparation of IRS Form 990;

• Submission of property tax exemptions to Travis County; and

• Other related services that may be requested or required.

• Submission of 50 copies of the final audit report

For a copy of the RFQ or information contact: Jerry W. Neef at (512) 597-7105 or email jerry.neef@twc.state.tx.us.

TRD-200704696
Jerry W. Neef
Deputy Director, Finance
WorkSource-Greater Austin Area Workforce Board
Filed: October 5, 2007

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Request for Quote for Legal Services

WorkSource-Greater Austin Area Workforce Board has issued a Request for Quote for Legal Services. WorkSource is a non-profit corporation with a 501(c)(3) tax-exempt status from the Internal Revenue Service. WorkSource is governed by a twenty-seven (27) member board of directors representing business, labor, education, economic development, community-based organizations, and government.

The proposer selected as a result of this RFQ will serve as legal counsel to WorkSource and its Board of Directors. Legal services to be provided include, but are not limited to the following:

A. Appropriate legal counsel to WorkSource and its Board of Directors in its capacity as administrative entity and grant recipient/fiscal agent for federal and state workforce funds and any future sources of funding.

B. Review, analysis, interpretation, and opinions regarding federal, state and local laws, regulations, rules, policies, contracts, and other related legal documents applying to WorkSource.

C. Legal counsel/advice regarding human resource matters such as FMLA, ERISA, workers' compensation and labor laws such as EEO/Non-discrimination, sexual harassment, wrongful termination, civil rights protections, and other applicable federal, state and local employment laws and regulations.

D. Represent WorkSource and its Board of Directors in related litigation and legal affairs.

E. Advocacy and representation in grievance and/or complaint proceedings/hearings.

F. Review and comment on procurement and contract documents, including facility leases.

G Advice on matters related to the Open Records Act and Public Information Act.

H. Advice on matters related to the Open Meetings Act.

I. Advice on all matters related to statutes and regulations pertaining to Texas non-profit corporations.

J. Attendance at Board and/or committee meetings as requested or required.

K. Other related legal matters as may be determined by the WorkSource Board of Directors and/or its Executive Director.

For a copy of the RFQ or other information contact: Jerry W. Neef at (512) 597-7105 or e-mail jerry.neef@twc.state.tx.us.

TRD-200704695
Jerry W. Neef
Deputy Director, Finance
WorkSource-Greater Austin Area Workforce Board
Filed: October 5, 2007

How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).